No. 86-735

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ALLEGHENY ELECTRIC COOPERATIVE, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FREDERICK L. MILLER, JR.
Duncan, Weinberg & Miller, P.C.
1615 M Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 467-6370
Counsel of Record

WILLIAM E. MOWATT
Allegheny Electric Cooperative, Inc.
P.O. Box 1266
Harrisburg, PA 17108
(717) 233-5704

WILLIAM C. WISE
4701 Willard Avenue
Chevy Chase, MD 20815
(301) 652-8578

Counsel for Petitioner

Of Counsel:
Robert Weinberg
Duncan, Weinberg & Miller, P.C.
1615 M Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 467-6370

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QUESTION PRESENTED

1. Whether the phrase "neighboring States" contained in the requirement of the Niagara Redevelopment Act, 16 U.S.C. § 836, *et seq.*, that power from the Niagara Project be provided on a preferential basis to public bodies and non-profit cooperatives "for use within reasonable economic transmission distance in neighboring States", 16 U.S.C. § 836(b)(2), was intended by Congress to include only the states of Pennsylvania and Ohio, as revealed by the legislative history, rather than all states within reasonable geographical proximity of New York.

LIST OF PARTIES

The parties to the proceedings below were the petitioner Allegheny Electric Cooperative, Inc., and the respondent Federal Energy Regulatory Commission. Other parties below included the Metropolitan Transportation Authority, Power Authority of the State of New York, Connecticut Municipal Electric Energy Cooperative, New Jersey Board of Public Utilities, Boston Edison Company, Eastern Edison Company, Fitchburg Gas and Electric Light Company, Massachusetts Electric Company, Municipal Electric Utilities Association of New York State, Vermont Department of Public Service, Public Service Electric and Gas Company, Massachusetts Municipal Wholesale Electric Company, City of Cleveland, Ohio, Bethlehem Steel Corporation, Borough of Lansdale, Pennsylvania, Arlene Violet, Attorney General of Rhode Island and Rhode Island Public Utilities Commission, Rockland Electric Company, Sussex Rural Electric Cooperative and the New Jersey Preference Boroughs.

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The petitioner Allegheny Electric Cooperative, Inc., prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on June 17, 1986, in which rehearing was denied on August 6, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 796 F.2d 584, and is reprinted in the appendix hereto.

The petitioner filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc, which was

denied on August 6, 1986. This denial of rehearing has not been reported and it is reprinted in the appendix hereto.

The opinion of the Court of Appeals upheld two orders of the Federal Energy Regulatory Commission. *Massachusetts Municipal Wholesale Electric Company v. Power Authority of the State of New York, et al.*, Opinion No. 229-A, Opinion and Order on Rehearing Clarifying Declaratory Opinion In Part, and Granting Petitions To Intervene Out of Time, 32 FERC (CCH) ¶ 61,194 (1985), Opinion No. 229, Declaratory Opinion and Order Affirming With Modifications Initial Decision On Niagara Preference Power For States Neighboring New York, 30 FERC (CCH) ¶ 61,323 (1985). Opinion No. 229 and Opinion No. 229-A are also reprinted in the appendix hereto.

The Initial Decision of the Administrative Law Judge at the Federal Energy Regulatory Commission in this case is also reprinted in the appendix hereto. *Massachusetts Municipal Wholesale Electric Company v. Power Authority of the State of New York, et al.*, 22 FERC (CCH) ¶ 63,087 (1983).

JURISDICTION

The decision and order of the United States Court of Appeals for the Second Circuit issued and was entered June 17, 1986. Rehearing was denied on August 6, 1986. The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. § 1254(l).

STATUTE INVOLVED

This controversy presents issues with respect to the Niagara Redevelopment Act, 16 U.S.C. § 836, which is set forth in the Appendix.

STATEMENT OF THE CASE

This case involves the allocation of power generated by the Power Authority of the State of New York ("PASNY") at its Niagara Project located at Niagara Falls, New York. PASNY was empowered to construct and operate the Niagara Project to utilize the United States' portion of the waters of the Niagara River, which drains portions of the states of Pennsylvania, Ohio, New York, Indiana, Illinois, Michigan, Wisconsin and Minnesota, by the Niagara Redevelopment Act ("NRA" or "Act"), 16 U.S.C. § 836, *et seq.* The Act requires that in disposing of 50 percent of the Niagara Project power, PASNY "give preference and priority to public bodies and non-profit cooperatives within economic transmission distance." 16 U.S.C. § 836(b)(1). The Act further requires PASNY to "make a reasonable portion of the project power subject to the preference provisions of paragraph (1) available for use within reasonable economic transmission distance in neighboring States . . ." 16 U.S.C. § 836(b)(2).

Petitioner Allegheny Electric Cooperative, Inc. ("Allegheny") is a non-profit Pennsylvania cooperative association.[1] Its members are non-profit rural electric distribution cooperatives, thirteen of which are located in Pennsylvania and one in New Jersey. Allegheny was formed by its members in order to obtain an adequate supply of reasonably priced wholesale power and energy. Allegheny, and its members, were financed principally by loans from the Rural Electrification Administration. Allegheny has been a

[1] Allegheny has no parent companies, subsidiaries or affiliates as defined in Rule 28.1.

purchaser of Niagara Project preference power since 1966, the earliest date for which transmission could be arranged.

This case began in March 1980, when the Massachusetts Municipal Wholesale Electric Company ("MMWEC") and the Connecticut Municipal Electric Energy Cooperative ("CMEEC") filed complaints, later consolidated, against PASNY at the Federal Energy Regulatory Commission ("FERC" or "Commission") challenging PASNY's failure to allocate any Niagara Project preference power to them. *Metropolitan Transportation Authority v. FERC*, 796 F.2d 584, 588 (2d Cir. 1986). Allegheny intervened in the proceeding before the FERC, raising the issue that the phrase "neighboring States" contained in the NRA was intended by Congress to be limited to the states of Pennsylvania and Ohio. 14 FERC (CCH) ¶ 61,128 (1981). Certified Record Pages 7307-7316. The Commission ruled upon the complaints of MMWEC and CMEEC in two orders[2] which decided several issues concerning the interpretation of the preference provision of the Act. Allegheny supports all but one of these interpretations, the Commission's interpretation of the phrase "neighboring States" in section 2 of the NRA, 16 U.S.C. § 836(b)(2) to include all states bordering New York. This interpretation is contrary to an extensive and explicit legislative history which clearly establishes that Congress intended the phrase "neighboring States" to be limited to Penn-

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[2] Opinion No. 229, 30 FERC (CCH) ¶ 61,323 (1985) and Opinion No. 229-A, 32 FERC (CCH) ¶ 61,194 (1985). Opinion No. 229-A was issued after the filing of applications for rehearing by numerous parties, including Allegheny; it denied such applications, and clarified Opinion No. 229.

sylvania and Ohio, the only states within the basin drained by the Niagara River which are claimed by any party to be within economic transmission distance of the Project.

Following the FERC's decision, several parties petitioned to review various aspects of FERC's opinions, including Allegheny which challenged the Commission's holding on the meaning of the phrase "neighboring States." *MTA v. FERC, supra* at 591.[3] The Second Circuit affirmed the FERC's decision, and denied all petitions for review. *Id.* Subsequently the Second Circuit also denied Allegheny's Petition for Rehearing and Suggestion for Rehearing En Banc. *MTA v. FERC, reh'g denied*, slip Op. (issued August 6, 1986).

REASONS FOR GRANTING THE WRIT

I. The Second Circuit's Failure To Analyze Fully The Legislative History Of The NRA Conflicts With The Decisions Of This Court.

The Second Circuit implicitly relied on the discredited plain meaning rule in rejecting Allegheny's claim that Congress intended the phrase "neighboring States" to be limited to the states of Pennsylvania and Ohio. *MTA v. FERC, supra* at 594-5. The Court of Appeals, in arriving at what it called a "literal" definition, that the phrase means "states found to be within reasonable geographical proximity of New York, after taking into account all relevant factors and whether they are within reasonable economic transmission distance . . ." (*Id.* at 594) completely ig-

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[3] Jurisdiction in the United States Court of Appeals for review of decisions of the FERC is conferred by 16 U.S.C. § 825*l*.

nored the numerous and explicit statements in the NRA's legislative history that Congress did intend to limit the phrase "neighboring States" to Pennsylvania and Ohio. In the face of this voluminous legislative history which includes clear statements in the committee reports and floor dialogue between drafters of the NRA squarely on point, the Court of Appeals merely said "there is *no evidence* that [Congress] intended 'neighboring States' as used in this phrase to have any meaning other than its literal one . . ." *Id.* (emphasis supplied. Wherever emphasis is used in this Petition, it is supplied unless otherwise noted.)

The court's failure even to examine or analyze the legislative history presented to it demonstrates a direct conflict with the teaching of this Court in numerous cases, perhaps best typified by *Train v. Colorado Public Interest Research Group*, 426 U.S. 1 (1976). In *Train*, the statute at issue defined, without qualification, the word "pollutants" to include radioactive materials. Although there could be no question as to the literal meaning of the words "radioactive materials," and no exclusion was provided for in the act, the Supreme Court expressly held that "radioactive materials" regulated by the Atomic Energy Commission were not covered by the act. *Id.* at 23-24. The Court based its opinion solely on the intent of Congress as revealed by the legislative history. It relied on the language of the House Committee Report which the Court demonstrated was supported by the debate which took place on the Senate and House floors. *Id.* at 13-14. In overruling the Court of Appeals, which based its ruling on the fact that the statute is plain and unambiguous and should be given its obvious meaning, the Supreme Court commented:

> To the extent that the Court of Appeals excluded reference to the legislative history of the FWPCA in discerning its meaning, the court was in error. As we have noted before: "*When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on superficial examination.*" [citing cases] In this case, as we shall see, the legislative history shed considerable light on the question before the court.

426 U.S. at 9-10.

In *University of California Regents v. Bakke*, 438 U.S. 265 (1979), a civil rights case, Mr. Justice Powell, interpreting a statute which prohibits "discrimination" based on "race, color, or national origin" commented, in his concurring opinion:

> We must, therefore, seek whatever aid is available in determining the precise meaning of the statute before us. *Train v. Colorado Public Interest Research Group*, 426 US 1, 10 (1976), quoting *United States v. American Trucking Assns.*, 310 US 534, 543-544 (1940). Examination of the voluminous legislative history of Title VI reveals a congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the constitution.
>
> * * *
>
> In view of the clear legislative intent, Title VI must be held to proscribe only those racial

> classifications that would violate the Equal Protection Clause of the Fifth Amendment.

438 U.S. at 284, 287. Another concurring opinion joined in by Justices Brennan, White, Marshall and Blackmun, observed:

> [T]hus, any claim that the use of racial criteria is barred by the plain language of the statute must fail in light of the remedial purpose of Title VI and its *legislative history*. . . . We have recently held that '[w]hen aid to construction of the meaning of words as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'." [citing cases]

438 U.S. at 340.

In another fairly recent civil rights case, *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), the Court explained:

> [I]n this context respondent's reliance upon a literal construction of §§703(a) and (d) and upon *McDonald* is misplaced. See *McDonald v. Santa Fe Trail Transp. Co., supra*, at 281 n.8. It is a "familiar rule, that a thing may be within the letter of the statute and not yet within the statute, because not within its spirit, nor within the intention of its makers." *Holy Trinity Ch. v. United States*, 143 U.S. 457, 459 (1892). The prohibition against racial discrimination in §§703(a) and (d) of Title VII must therefore be read against *the background of the legislative history* of Title

> VII and the historical context from which the Act arose. [citing cases]

443 U.S. at 201.

In an even more recent case, *Stafford v. Briggs*, 444 U.S. 527 (1980), Chief Justice Burger wrote that a statute's use of the unqualified words, "a civil action," does not include all civil actions, but only actions in the nature of *mandamus*. In Chief Justice Burger's opinion, he made an exhaustive review of the legislative history including the hearings. The Chief Justice observed:

> [T]he language of §1391(e) does refer to "a civil action." Recitation of the fact, however, but begins our inquiry.
>
> * * *
>
> Our analysis does not stop with the language of the statute; we must also look to "the objects and policy of the law." *Brown v. Duchesne*, 19 How., at 194. In order to "give [the Act] such a construction as will carry into execution the will of the Legislature . . . according to its true intent and meaning," *ibid.*, we turn to the legislative history. *Schlanger v. Seamans*, 401 US 487, 490 n.4 (1971). See also *United States v. Culbert*, 435 U.S. 371, n.4 (1978); *Train v. Colorado Public Interest Research Group*, 426 US 1, 9-10 (1976).
>
> * * *
>
> The clear purport of our statement in *Schlanger* is that Congress did not intend the phrase "civil action" to be given the sweeping def-

> inition argued for it in that case, and that *the court was required to turn to the legislative history* to determine which "civil actions" §1391(e) governed.

444 U.S. at 535, 536, 543.

Prior to *Train*, *United States v. American Trucking Associations*, 310 U.S. 534 (1940) was the most often cited authority on this subject, and was never questioned by the Court. *See also Guiseppi v. Walling*, 144 F.2d 608 (2d Cir. 1944) where Judge Learned Hand stated, in a concurring opinion, "There is no surer way to misread a document than to read it literally. . ." at 624; and *Cabell v. Markham*, 148 F.2d 737 (2d Cir. 1945) where Judge Hand further held that "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary. . ." at 739.

Furthermore, this Court ruled in *Train* that legislative history need not be unanimous to be persuasive, even to contradict seemingly plain and unambiguous statutory language. The Court in *Train* reached its conclusion despite the fact that it agreed that the Senate Committee Report permitted the inference that the Committee was contemplating controls in the act over the discharge of Atomic Energy Commission-regulated radioactive materials. The Court explained:

> Still, we are not prepared to attribute greater significance to this inference than to *the more explicit statement contained in the House committee report*, a statement that, as we shall see, is amply supported by the discussion on the floors of the House and Senate.

426 U.S. at 13, 14.

The Court reached this conclusion despite the further fact that a few members of Congress in isolated statements had indicated an opinion contrary to that reached by the Court. 426 U.S. at 23-24. In *Bakke*, Mr. Justice Powell similarly stated

> Although isolated statements of various legislators, taken out of context, can be marshaled in support of the proposition that §601 enacted a purely colorblind scheme without regard to the reach of the Equal Protection Clause, these comments *must be read against the background of both the problem that Congress was addressing and the broader view of the statute that emerges from a full examination of the legislative debates.*

438 U.S. at 284-5. *See also New England Power Co. v. New Hampshire*, 455 U.S. 331, 342 (1982). That is the kind of examination the Second Circuit failed to make.

The extent of the Second Circuit's departure from this Court's teaching in *Train* and the other cases just discussed can only be seen by a review of the lengthy legislative history presented to it, which it completely ignored. While the following excerpts from the NRA's legislative history by no means exhaust the evidence (and the evidence presented to the Second Circuit) that Congress intended the "neighboring States" to be only Pennsylvania and Ohio it gives an indication of the magnitude of the Court of Appeals' conflict with the approach of this Court.

The House Committee Report on the bill which became the NRA, H.R. Rep. No. 862, 85th Cong., 1st

Sess., *reprinted in* 1957 U.S. Code Cong. & Ad. News 1585, opens with a complete history of the legislation. Explaining the bills before the Committee, the report points out that all but one of the disputes over previous bills had been compromised:

> The only remaining difference of views relates to the application of the Federal power preference policy in the marketing of Niagara power and the extent to which Niagara power should be required to be made available in the States of *Pennsylvania and Ohio.*

at 1587.

The categorical statement is made that the neighboring States referred to in the bill are Ohio and Pennsylvania:

> Notwithstanding the broad areas of agreement which have been reached, there are continued differences of views, as reflected in the bills before the committee, as to the following matters: . . . .
>
> (2) *The extent to which Niagara power should be required to be made available to neighboring States, that is, Ohio and Pennsylvania.*

at 1592. Curiously, this explicit statement is never even mentioned by the Court of Appeals.

There are other statements in the report which confirm that Congress was talking only about Ohio and Pennsylvania when it used the term, "neighboring States". Further along in the discussion, we find this paragraph:

> There is disagreement, however, as to the maximum amount of project power subject

> to the preference provisions which should be required to be made available. On behalf of such States--*Ohio and Pennsylvania*--it is asserted that the waters of the Niagara River constitute a regional resource rather than that of a single State, that power may be transmitted economically for 300 miles, and that the number of preference customers in the *two* States far exceed the number in New York.

at 1593.

The Senate Report, S. Rep. No. 539, 85th Cong., 1st Sess. (1957), confirms the House Report. In discussing the market for Niagara power it states that the project "could supplement the present power supply in western New York and could also provide additional power for northwestern Pennsylvania and northeastern Ohio." *Id.* at 5. The Senate Report sets forth a statement and studies made by PASNY which show that Pennsylvania and Ohio are the only two other states to receive power, including a tentative allocation made by PASNY of 150,000 kW to Ohio and Pennsylvania. *Id.* at 5-6. No mention is made of any other state.

In addition, the minority views of Senator Neuberger, attached to the Senate Report, confirm (pp. 11-13) that the neighboring State power was intended to go exclusively to Pennsylvania and Ohio. No member of either House raised any question with respect to either of the committee reports. Instead, Congressman after Congressman and Senator after Senator confirmed in the floor debates the categorical statement in the House Report that Ohio and Penn-

sylvania were the neighboring States to which Niagara power would be required to be made available.

Rep. Buckley, Chairman of the Public Works Committee, and sponsor of the bill, in a short introductory statement explained: "This is to take care of northwestern Pennsylvania and northeastern Ohio." 103 Cong. Rec. 13195 (1957).

Rep. Blatnik, Chairman of the subcommittee which considered the bill, was the manager of the bill. He made these unequivocal statements:

> It also provides that up to 20 percent of such preference power may be sold outside of the State of New York. *This is to take care of municipalities and co-ops in northwestern Pennsylvania and northeastern Ohio.*

103 Cong. Rec. 13195.

> Some question has been raised as to the distribution of Niagara power into neighboring States. As I stated, this bill generously provides for power distribution to co-ops and municipalities in *Pennsylvania and Ohio.*

103 Cong. Rec. 13196.

> A reasonable amount in this case is 20 percent of the power. *This will be made available to Pennsylvania and Ohio.* . . .

Id.

Rep. McGregor inserted into the record a letter from Robert Moses, PASNY's chairman, to Sen. Clark, in which Mr. Moses made this statement:

> We shall be happy to allocate a reasonable amount of power to *Pennsylvania and Ohio*

> if it turns out that it is wanted and can be economically delivered and paid for there.

103 Cong. Rec. 13200.

Rep. Chudoff, speaking in favor of giving more power out of state, made it clear that the bill as written covered only Pennsylvania and Ohio, as neighboring States. He introduced a chart, prepared by PASNY, which showed the preference customers at varying distances from the Niagara project. The chart covered only New York, Pennsylvania and Ohio. No other state was mentioned. 103 Cong. Rec. 13204-5.

Rep. Kluczynski of Illinois, another member of the committee on Public Works, offered this observation in his discussion of the bill:

> I think that New York State in consenting to give 20 per cent of the 50 per cent preference power available under this bill to *Pennsylvania and Ohio* has been more than just and has acted in a most generous manner.

103 Cong. Rec. 13205.

Rep. Flood stated:

> Moreover, even if these facts were not so, there are other and perhaps more serious circumstances surrounding the export of Niagara power into the neighboring *States of Pennsylvania and Ohio*. . . . A capacity of 180,000 kW is to be made available to the *States of Pennsylvania and Ohio*.

103 Cong. Rec. 13208.

The Senate debates were quite similar. Sen. Ives (of New York) said:

> . . . yet it also provides adequately and more than adequately, for the future needs of rural cooperatives and municipal utility systems in New York, *Ohio and Pennsylvania.*
>
> * * *
>
> Cooperative and municipal systems in *Ohio and Pennsylvania* will get a fair share of power under this bill.
>
> * * *
>
> We in New York State have no desire to be selfish about this power. We want *Ohio and Pennsylvania* to have a fair share.

103 Cong. Rec. 14439. He mentioned no other states.

Sen. Clark (of Pennsylvania) said:

> . . . The only question which confronts the Senate in connection with the amendment sponsored by the Senator from Oregon [Mr. Neuberger], the Senator from Ohio [Mr. Lausche], and myself, is whether the bill is fair and just to the States of *Ohio and Pennsylvania.* It is our contention that it is not. . . . *Ohio and Pennsylvania* do not come before the Senate as supplicants to the State of New York with tin cups in their hands. We, as sovereign States--two of the eight states whose waters contribute to the Niagara Falls--have an equal right with New York State and with her other sister States to the waters which is the basis for the power plant to be erected.

* * *

> It may be asked, why should *Ohio and Pennsylvania* protest, if they are getting 20 percent of the part of the power which is set aside for preference purposes? this is why:
>
> . . . .

103 Cong. Rec. 14439-14440. Senator Clark then argued that Ohio and Pennsylvania should receive a larger portion of the Niagara power than the 20 percent of the preference power provided in the bill. 103 Cong. Rec. 14440. He could not have been more specific than he was in explaining that Pennsylvania and Ohio would receive 20 percent of the preference power if the bill passed. No one, but no one, took issue with his statement or the statements made by any of the other Senators explaining that the neighboring State power would go to Pennsylvania and Ohio.

Sen. Neuberger argued that more power output should be made available to Ohio and Pennsylvania. In disputing the argument that to give Pennsylvania and Ohio more than 10 percent would have an adverse effect on the sale of PASNY's bonds, he made these comments:

> However, I do not understand how it would be possible to sell the bonds if they give Ohio and Pennsylvania only 10 percent of the power, but that they cannot sell the bonds if they give these States 20 percent of the power. Do not these people in Pennsylvania and Ohio have coin of the realm?

103 Cong. Rec. 14445. He added:

> Let us look at Niagara Falls. Niagara Falls is not one little short river. Niagara Falls is

> all the Great Lakes rushing to the sea. *The waters in Ohio and the waters in Pennsylvania contribute to Niagara Falls. Those States have a real stake in the project. They help originate the river.*

103 Cong. Rec. 14446.

Sen. Carroll of Colorado directed the following question to Sen. Kerr who was chairman of the subcommittee which reported out the bill, drafted the compromise language (Sections (1) and (2)) of the Niagara Act and was in charge of the bill on the floor of the Senate:

> Was it not the intention of the committee that 20 percent of the 50 percent of power should be given to the neighboring States of Pennsylvania and Ohio? This is my understanding and that is why I wish to make the record.

103 Cong. Rec. 14450. Sen. Kerr replied in this fashion:

> As I remember it--and the distinguished presiding officer at this time [Mr. Cotton] was present in the committee--the committee agreed and decided to allocate up to 20 percent of one half to which the federal preference clause was attached for use *in the neighboring States of Pennsylvania and Ohio.* The Senator is eminently correct that *that was the purpose of the committee, and that is what the committee did.* That is the language of the bill.

103 Cong. Rec. 14450. Sen. Kerr later added:

> I remind Senators the purpose of the amendment is to give the States of Ohio and Pennsylvania a call on nearly 20 percent of the power to be developed. . . .

103 Cong. Rec. 14453-4.

Sen. Carroll introduced a bill to increase the 20 percent to 25 percent. In explanation of his amendment, he made this statement:

> The bill provides for only 20 per cent. It is my recollection that the subcommittee agreed that *Pennsylvania and Ohio* were to get 20 percent of the 50 percent, or 180,000 kW. My amendment would provide 5 percent more, or 225,000 kW. . . . Under my amendment, the State of *Ohio* and the State of *Pennsylvania*, if they could come within the definition of economic transmission distance, would get 225,000 kW. Out of how much, 1,800,000 kW.
>
> * * *
>
> I ask only that the preference customers in *Pennsylvania and Ohio* be given this extra 5 percent of power and that my amendment be agreed to.

103 Cong. Rec. 14454.

Sen. Kerr, again commented:

> . . . especially in view of the language on page 3 of the House bill, in line 2, where it is stated: "In the event of disagreement between the licensee and the power-marketing agencies of any such States"--That would mean the States of *Pennsylvania and Ohio.*

103 Cong. Rec. 14455.

Sen. Lausche, speaking in support of the Clark amendments, stated:

> The argument has been made that leniency and mercy are being shown to the States of *Pennsylvania and Ohio* in the allocation of 20 percent of the 50 percent of 1,800,000 kW of power which will be generated.

103 Cong. Rec. 14452.

Sen. Lausche made it clear that the reason for neighboring States being limited to Ohio and Pennsylvania was that the Niagara Project would utilize waters of a navigable stream to which Ohio and Pennsylvania contribute water. *Id.* They were the only two of the states comprising the region furnishing the waters for the project which were in a position to receive power from the project. None of the New England States or New Jersey is included in that region, they provide no water to the project. Moreover, no representatives of such States played any part in seeking the authorization of the Niagara Project. In the entire Senate debates no States other than Pennsylvania and Ohio are mentioned as possibly being "neighboring States."

The Court of Appeals never explained how all of this evidence (and more) which was cited to it constituted "no evidence." *MTA v. FERC*, *supra* at 594. The court never bothered, for instance, to say why the House Committee Report, Senator Kerr and Senator Carroll should not be believed. It is hard to imagine a more clear cut conflict with this Court's teaching in *Train* that it is error to ignore legislative history

in determining the meaning of even an unambiguous statutory phrase. *Train*, *supra* at 9-10.

The Court of Appeals did cite a few references to the legislative history of the NRA in an attempt to bolster its conclusion of a "literal" definition. *MTA v. FERC*, *supra* at 594. However that limited and highly selective use which the court made of legislative history further contrasts its approach with that of this Court in *Train*.

The court provides numerous citations for the proposition "that *for a time* only customers in western Pennsylvania and northeastern Ohio would receive power under § 836(b)(2)." *MTA v. FERC*, *supra* at 594. However, while these citations amply demonstrate that Pennsylvania and Ohio were the intended beneficiaries of neighboring State power, not one indicates that any New England State or New Jersey was or could ever become a neighboring State. The primary citations were to the portions of the House and Senate Reports which have already been quoted; they simply say nothing about eventually sending power to states other than Pennsylvania and Ohio.

It is true that there was disagreement over the number of miles constituting economic transmission distance, and that "economic transmission distances [are] mutable." *Id.* However, the opinion points to no statement that the composition of neighboring States was intended to be tied to a changing perception of economic transmission distance. In the words of the House Report the debate was over "The *extent* to which Niagara power should be required to be made available to *neighboring States, that is, Ohio and Pennsylvania*." *Supra*, at 1592.

The few examples of Congressional intent cited to show that power should be sent to states other than Pennsylvania and Ohio are not persuasive compared to the extensive legislative history already discussed. The court stated "Several congressmen stated that states other than Ohio and Pennsylvania could receive power if they were within economic transmission distance." *MTA v. FERC, supra* at 594. The only statement which even comes close is the comment of Rep. Miller which mentions Massachusetts. 103 Cong. Rec. 13204. Even if taken at face value it cannot outweigh the Committee Reports (*see Zuber v. Allen*, 396 U.S. 168 (1969), committee reports held the most reliable and authoritative source of legislative history) or the numerous and more explicit floor statements to the contrary, such as the colloquy between Sen. Carroll and Sen. Kerr quoted above. In any event, Rep. Miller's statement is so confused it cannot be taken at face value. It is respectfully submitted that Rep. Miller inadvertently referred to Massachusetts. Rep. Miller sat through all of the debates in the House and never once raised any question about the statements of his colleagues which explain that the neighboring States were Ohio and Pennsylvania. As a matter of fact, his own statements in the debate were to the same effect. 103 Cong. Rec. 13203. It also should be noted that Rep. Miller was more than somewhat confused when he made the statement cited by the Court. He commented that "10 percent of the 50 percent, or 20 percent of the whole, will be available to New York or the neighboring States." 103 Cong. Rec. 13204. The statement, of course, represents a mathematical impossibility. Even more confused is the statement that that amount "will be available to New York or the neighboring States." *Id.* The NRA is absolute in

its provision that the 20 percent will most definitely *not* be available to New York, but only to neighboring States. When Rep. Miller referred to Massachusetts as a "neighboring State" it is clear that he was not speaking of the situation under the NRA, but what it was insofar as the St. Lawrence Project. Massachusetts had previously applied for and then withdrew its request for an allocation of St. Lawrence power. *See Development of Power at Niagara Falls, N.Y., 1957: Hearings on S. 512 and S. 1037 Before a Subcomm. of the Comm. on Public Works*, 85th Cong., 1st Sess. (1957) (hereinafter "Hearings") at 73. Additionally, under the NRA a party does not apply first to the Commission for power as indicated by Rep. Miller, rather, all applications for power are initially directed to PASNY. Under the NRA, the matter gets to the Commission only if a state bargaining agency has a disagreement with PASNY. Obviously, this statement with so many glaring errors can in no way be used as a reliable guide to the meaning of the NRA.

At the Senate Hearings, Rep. Miller was asked by Sen. Carroll:

> Is it contemplated in this project that this power is only for New York, or would it also serve Pennsylvania and Ohio?
>
> Mr. Miller: "Within the economic transmission distance, and that is so provided in this bill, which will be a small part of the state of Pennsylvania, the northwestern section of Pennsylvania and the eastern part of the state of Ohio."

Hearings at 26. He did not add, and eventually Massachusetts or other states.

The next "citation" is to a letter from PASNY's Chairman, Robert Moses. *MTA v. FERC*, *supra* at 594. The letter was submitted by Rep. McGregor, in his words "so that *Ohio and Pennsylvania* may know what to expect" 103 Cong. Rec. 13198. The letter emphasizes the limited out of state area that could be served by Niagara power. The only states, other than New York, that the letter contemplates as even potential customers are Ohio and Pennsylvania. It offers no support for the proposition that any additional states could ever be neighboring States.

The opinion goes on to state that Rep. McGregor suggested Indiana could receive Niagara power. *Id.* Allegheny respectfully submits he made no such suggestion. In response to an argument that the bill would put miners out of work, all he said was:

> There is nothing in this bill that puts the miners of Pennsylvania, Indiana, or Ohio out of work. There is no power forced upon Indiana, Pennsylvania, or Ohio . . . I repeat, there is no provision in this bill that would force power upon Pennsylvania, Ohio, Indiana, or any unwilling purchaser.

103 Cong. Rec. 13211. That is hardly a statement that Indiana is a neighboring State.

Finally the opinion cites Sen. Chavez. *MTA v. FERC*, *supra* at 594. His comments were about the project in general, not specifically the neighboring States allocation. What he said was:

> The New York and New England area has the highest power rate of any section of the country. It is hoped that the Niagara project will provide a source of cheap, dependable power that will provide an adequate yardstick and permit lower power rates and greater use of electricity over a large part of the northeastern section of our country.

103 Cong. Rec. 14438. The three state area of New York, Ohio and Pennsylvania is itself "a large part of the northeastern section of our country." Sen. Chavez's understanding of which states are neighboring States was much more explicitly stated in his response to Sen. Clark's arguments for an amendment to make the bill fairer to the neighboring States, he replied that "it was not the purpose of the Committee on Public Works to deprive *Pennsylvania* or *Ohio* of any of their rights." 103 Cong. Rec. 14440. Had he felt that any other States could be neighboring States he would surely have mentioned them at that point. He did not.

II. The Issue In This Case Is of Great Importance, Especially In Effectuating the Will of Congress Expressed, Not Only In the NRA, But In Power Preference Laws Which Apply Nationwide.

The determination of the proper definition of the term "neighboring States" is of exceptional importance. Its resolution will govern whether a unique and extremely valuable resource, low cost preference hydropower generated at the Niagara Project, will be distributed in accordance with the intent of Congress. The great impact of this determination is not limited to the parties to this case, nor even to the enormous direct savings attainable by the purchase of low cost

Niagara Project power rather than relying on generation by coal, oil, or nuclear powered units. What is at stake is the attainment of the Congressional purpose behind power preference laws generally.

The Second Circuit, in an earlier section of its decision in this case, succinctly described the Congressional purpose behind the NRA's preference provision:

> As we noted in *Power Authority of State of N.Y.* [*v. FERC*, 743 F.2d 93, 105 (2nd Cir. 1984)], Congress' intent in adopting the NRA's preference provisions was to foster 'yardstick competition.' S.Rep. No. 539, 85th Cong., 1st Sess. 7 (1957) ("S.Rep."); *Development of Power at Niagara Falls, N.Y.: Hearings Before a Subcommittee of the Committee on Public Works on S. 512 and S. 1037*, 85th Cong., 1st Sess. 12-13 (1957) ("S. Hearings") (Sen. Clark); 103 Cong. Rec. 14438 (1957) (Sen. Chavez). Congress believed that it was necessary to create 'publicly owned power' because "electric-power distribution tends to be a monopoly, and . . . the only way to gain for the consumer the normal benefits that . . . flow from competition is to develop public-power 'yardsticks". Minority Views of Senator Richard L. Neuberger, S.Rep., *supra*, at 10. *See also* S. Hearings, *supra*, at 12-13 (Sen. Clark). The municipal utilities, Congress hoped, would act as yardsticks by using their supply of hydropower to charge rates which would force the private utilities to reduce their prices or at least serve as a measure by which regulators could set the private utilities' rate of return.

> *Power Authority of the State of New York, supra*, 743 F.2d at 105.

MTA v. FERC, supra at 591-2 (footnotes omitted).

The concept that the NRA preference is a "federal-type preference" is fully explained in *Power Authority of State of N.Y. v. FERC*, 743 F.2d 92 (2nd Cir. 1984) where the court noted that Congress evidenced

> a clear intent to adopt for 50% of the Niagara Project power a 'federal'-type preference. Congress, while concerned with meeting the needs of rural and domestic consumers, believed that all interests could best be served by giving the local entities the right to decide on the ultimate retail distribution of the preference power sold to them. *See, e.g.*, Bonneville Project Act, 16 U.S.C. § 832c(a) (preference given to 'public bodies and cooperatives'); Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831i (preference to 'States, counties municipalities, and cooperative organizations'). This belief was founded on the so-called 'yardstick competition' principle, which assumes that if the municipal entities (as distinguished from the end-users) are supplied with cheap hydropower their lower competitive rates will force the private utilities in turn to reduce their rates, with resulting benefits to all, including rural and domestic consumers.

Id. at 105

Thus, the NRA preference is part of a nationwide statutory scheme whereby certain low cost hydropower is sold on a preferential basis to cooperatives

and public bodies to ensure that not only are the direct benefits of the low cost of the power passed on to consumers, but also that lower rates result for all consumers of electricity, including those served by investor-owned utilities, as a result of increased competition. The Second Circuit's ruling on the "neighboring States" question makes attainment of this Congressional goal much more difficult to accomplish.

As the Court of Appeals recognized in this case, the benefits to all consumers from yardstick competition can be lost if the preference power is spread too widely. The court stated:

> Indeed, if preference power were made available to all government bodies, whether or not they distributed that power to consumers, every town and local library would be entitled to claim a direct share. Niagara hydropower would be spread so thin that any competitive effect it might have had would be lost.

MTA v. FERC, *supra* at 592.

The same principle applies to the geographical dilution which would result from the Second Circuit's decision. The neighboring States' portion of the Niagara preference power is an even more limited resource than the in-state allocation discussed in *PASNY v. FERC*, *supra*. The NRA grants 80 percent of the Niagara preference power to preference customers in New York, and only 20 percent to such customers in neighboring States. 16 U.S.C. § 836(b)(2).

Niagara power is so cheap that its economic transmission distance is now extremely long; even with very substantial line losses and transmission charges

purchase of Niagara power is cheaper than alternative sources. While savings will result to preference customers in this vast area, it is quite likely that the savings will "be spread so thin" that Congress' intended pro-competitive effect may be greatly reduced, if not lost altogether. *MTA v. FERC*, *supra* at 592. On the other hand, concentration of the limited neighboring States' preference power in the intended states of Pennsylvania and Ohio will foster the Congressional purpose of enhancing competition. Thus concentrated, the limited resource can achieve the greatest possible pro-competitive impact. Preference customers in Pennsylvania and Ohio, with access to a proportionately more substantial amount of preference power could pose a real threat to investor-owned utilities and force them to respond with increased efficiency and lowered costs.

Thus, the Second Circuit's ruling broadening "neighboring States" to include all within reasonable economic transmission distance will likely lessen the pro-competitive benefits of the Niagara preference power. It is unreasonable to assume that Congress intended a distribution of preference power so directly contrary to the accomplishment of the very purpose of preference power. Thus, the court's decision conflicts with the NRA and power preference laws generally.

CONCLUSION

WHEREFORE, for the reasons set forth herein, petitioner most respectfully prays that this Court grant this Petition for a Writ of Certiorari, and issue an Order allowing this matter to stand for briefing

on the merits, oral argument and plenary consideration by this Court.

Respectfully submitted,

FREDERICK L. MILLER, JR.
Duncan, Weinberg & Miller, P.C.
1615 M Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 467-6370

Counsel of Record

Of Counsel:

Robert Weinberg
Duncan, Weinberg & Miller, P.C.
1615 M Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 467-6370

WILLIAM E. MOWATT
Allegheny Electric Cooperative, Inc.
P.O. Box 1266
Harrisburg, PA 17108
(717) 233-5704

WILLIAM C. WISE
4701 Willard Avenue
Chevy Chase, MD 20815
(301) 652-8578

November 4, 1986

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket Nos. 85-4115, 85-4149, 85-4151, 85-4153, 85-4159, 85-4165

FILED
AUGUST 6, 1986

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 8th day of one thousand nine hundred and eighty- six

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METROPOLITAN TRANSPORTATION AUTHORITY, POWER AUTHORITY OF THE STATE OF NEW YORK, CONNECTICUT MUNICIPAL ELECTRIC ENERGY COOPERATIVE, ALLEGHENY ELECTRIC COOPERATIVE, INC., NEW JERSEY BOARD OF PUBLIC UTILITIES, BOSTON EDISON COMPANY, EASTERN EDISON COMPANY, FITCHBURG GAS AND ELECTRIC LIGHT COMPANY, AND MASSACHUSETTS ELECTRIC COMPANY,

Petitioners,

—against—

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

MUNICIPAL ELECTRIC UTILITIES ASSOCIATION OF NEW YORK STATE, VERMONT DEPARTMENT OF PUBLIC SERVICE, ALLEGHENY ELECTRIC COOPERATIVE INC., PUBLIC SERVICE ELECTRIC AND GAS COMPANY, CONNECTICUT MUNICIPAL ELECTRIC ENERGY COOPERATIVE, MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY, CITY OF

CLEVELAND, OHIO, NEW JERSEY BOARD OF PUBLIC UTILITIES, BETHLEHEM STEEL CORPORATION, BOROUGH OF LANDSDALE, ARLENE VIOLET, ATTORNEY GENERAL OF RHODE ISLAND AND RHODE ISLAND PUBLIC UTILITIES COMMISSION, BOSTON EDISON COMPANY, EASTERN EDISON COMPANY, FITCHBURG GAS AND ELECTRIC LIGHT COMPANY, MASSACHUSETTS ELECTRIC COMPANY, AND SUSSEX RURAL ELECTRIC COMPANY,

Intervenors.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for

Intervenor: ALLEGHENY ELECTRIC COOPERATIVE INC.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ ELAINE B. GOLDSMITH
Elaine B. Goldsmith
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1150-55—August 1985 Term

Argued: April 23, 1986 Decided: June 17, 1986

Docket Nos. 85-4115, 85-4149, 85-4151,
85-4153, 85-4159, 85-4165

METROPOLITAN TRANSPORTATION AUTHORITY, POWER AUTHORITY OF THE STATE OF NEW YORK, CONNECTICUT MUNICIPAL ELECTRIC ENERGY COOPERATIVE, ALLEGHENY ELECTRIC COOPERATIVE, INC., NEW JERSEY BOARD OF PUBLIC UTILITIES, BOSTON EDISON COMPANY, EASTERN EDISON COMPANY, FITCHBURG GAS AND ELECTRIC LIGHT COMPANY, and MASSACHUSETTS ELECTRIC COMPANY,

Petitioners,

—against—

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

MUNICIPAL ELECTRIC UTILITIES ASSOCIATION OF NEW YORK STATE, VERMONT DEPARTMENT OF PUBLIC SERVICE, ALLEGHENY ELECTRIC COOPERATIVE INC., PUBLIC SERVICE ELECTRIC AND GAS COM-

PANY, CONNECTICUT MUNICIPAL ELECTRIC ENERGY COOPERATIVE, MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY, CITY OF CLEVELAND, OHIO, NEW JERSEY BOARD OF PUBLIC UTILITIES, BETHLEHEM STEEL CORPORATION, BOROUGH OF LANDSDALE, ARLENE VIOLET, ATTORNEY GENERAL OF RHODE ISLAND AND RHODE ISLAND PUBLIC UTILITIES COMMISSION, BOSTON EDISON COMPANY, EASTERN EDISON COMPANY, FITCHBURG GAS AND ELECTRIC LIGHT COMPANY, MASSACHUSETTS ELECTRIC COMPANY, and SUSSEX RURAL ELECTRIC COMPANY,

Intervenors.

Before:

LUMBARD, MANSFIELD and MESKILL,
Circuit Judges.

Several utilities, state power authorities and the Metropolitan Transportation Authority appeal from orders of the Federal Energy Regulatory Commission establishing the amount of Niagara Project hydropower which the Power Authority of the State of New York is required by the Niagara Redevelopment Act, 16 U.S.C. § 836, *et seq.*, to sell to "public bodies in neighboring states" and defining the meaning of those terms.

Affirmed.

RENEE SCHWARTZ, New York, NY (Ezio Scaldaferri, Botein Hays & Sklar, New York, NY, of counsel), *for Petitioner Metropolitan Transportation Authority.*

DAVID R. STRAUS, Washington, DC (Scott H. Strauss, Spiegel & McDiarmid, Washington, DC, of counsel), *for Petitioner Connecticut Municipal Electric Energy Cooperative.*

ROBERT WEINBERG, Washington, DC (Duncan, Weinberg & Miller, P.C., Washington, DC; William C. Wise, Chevy Chase, MD; William E. Mowatt, General Counsel, Allegheny Electric Cooperative, Inc., Harrisburg, PA, of counsel), *for Petitioner Allegheny Electric Cooperative, Inc.*

CARMEN L. GENTILE, Washington, DC (Bruder & Gentile, Washington, DC, of counsel), *for Petitioners Boston Edison Company, Eastern Edison Company, Fitchburg Gas and Electric Light Company, and Massachusetts Electric Company.*

CHARLES M. PRATT, Senior Vice President and General Counsel, Power Authority of the State of New York, New York, NY (Arthur T. Cambouris, Wendy M. Lane, Power Authority of the State of New York, New York, NY, of counsel), *for Petitioner Power Authority of the State of New York.*

W. CARY EDWARDS, Attorney General of State of New Jersey, Newark, NJ (Elise Goldblat, Deputy Attorney General, Newark, NJ, of counsel), *for Petitioner New Jersey Board of Public Utilities.*

JOSHUA Z. ROKACH, Attorney, Federal Energy Regulatory Commission, Washington, DC (William H. Satterfield, General Counsel, Jerome M. Feit, Solicitor, Federal Energy Regulatory Commission, Washington, DC, of counsel), *for Respondent Federal Energy Regulatory Commission.*

DUNCAN, WEINBERG & MILLER, P.C., Washington, DC (Wallace L. Duncan, J. Cathy Lichtenberg, Jeffrey C. Genzer, Washington, DC, of counsel), *for Intervenor Municipal Electric Utilities Association of New York State.*

ELY, RITTS, BRICKFIELD & BETTS, Washington, DC (Philip L. Chabot, Jr., Kirk Howard Betts, Washington, DC, of counsel), *for Intervenor Sussex Rural Electric Cooperative.*

SPIEGEL & MCDIARMID, Washington, DC (David R. Straus, Scott H. Struass, Washington, DC, of counsel), *for Intervenors Massachusetts Municipal Wholesale Electric Company and Connecticut Municipal Electric Energy Cooperative.*

GERALD TARRANT, Vermont Department of Public Service, Montpelier, VT (Patterson, Belknap, Webb & Tyler, New York, NY; McCarthy, Sweeney & Harkaway, P.C., Washington, DC, of counsel), *for Intervenor Vermont Department of Public Service.*

WILLIAM E. MOWATT, General Counsel Allegheny Electric Cooperative, Inc., Harrisburg, PA (Robert Weinberg, Duncan, Weinberg & Miller, P.C., Washington, DC; William C. Wise, Chevy Chase, MD, of counsel), for *Intervenor Allegheny Electric Cooperative, Inc.*

JAMES R. LACEY, General Solicitor, Public Service Electric and Gas Company, Newark, NJ, *for Intervenor Public Service Electric and Gas Company.*

MARILYN G. ZACK, Director of Law, City of Cleveland, OH (June W. Wiener, Chief Asst. Director of Law, William M. Ondrey Gruber, Asst. Director of Law, Cleveland, OH; Reuben Goldberg, Goldberg, Fieldman and Letham, P.C., Washington, DC, of counsel), *for Intervenor City of Cleveland, OH.*

W. CARY EDWARDS, Attorney General, State of New Jersey, Newark, NJ (Elise Goldblat, Deputy Attorney General, Newark, NJ, of counsel), *for Intervenor New Jersey Board of Public Utilities.*

LAW OFFICES OF ALGIRD F. WHITE, JR., Albany, NY (Barbara S. Brenner, Albany, NY, of counsel), *for Intervenor Bethlehem Steel Corporation.*

WHEATLEY & WOLLESEN, Washington, DC, (Charles F. Wheatly, Washington, DC, of counsel), *for Intervenor Borough of Lansdale, Pennsylvania.*

SHELDON WHITEHOUSE, Special Assistant Attorney General, Providence, RI, *for Intervenors Arlene Violet, Attorney General of Rhode Island, and Rhode Island Public Utilities Commission.*

BRUDER & GENTILE, Washington, DC, (Carmen L. Gentile, Washington, DC, of counsel), *for Intervenors Boston Edison Company, Eastern Edison Company, Fitchburg Gas and Electric Light Company and Massachusetts Electric Company.*

MANSFIELD, *Circuit Judge*:

Nine parties to this proceeding have filed petitions for review of two decisions of the Federal Energy Regulatory Commission ("FERC") concerning the allocation of hydropower produced by the Niagara Power Project ("the Project").[1] The Niagara Redevelopment Act, 16

[1] The orders are: *Opinion No. 229; Declaratory Opinion and Order Affirming With Modifications Initial Decision on Niagara Preference*

U.S.C. § 836, *et seq.*, requires the Power Authority of the State of New York ("PASNY"), the licensee authorized to operate the Project, to allocate "a reasonable portion" of the Project power, which may not be more than 10%, to "public bodies and nonprofit cooperatives . . . within reasonable economic transmission distance in neighboring states." The petitions challenge FERC's holding that (i) "public bodies" are "publicly-owned sellers and distributors of electricity at retail", (ii) neighboring states include, at least, those states which border New York, (iii) PASNY is required to sell a "reasonable portion" of the Project's power, up to 10%, to public bodies and nonprofit cooperatives outside of New York, and that 10% of the Project's power was such a reasonable portion under current circumstances, and (iv) public bodies and nonprofit cooperatives outside of New York are not entitled to an extra allotment of power as retroactive relief for PASNY's past failure to sell them 10% of the Project power. We affirm.

BACKGROUND

FERC has licensed PASNY to administer the Niagara Power Project, which generates hydro-electric power from the Niagara River near Niagara Falls. The Niagara Redevelopment Act (the "NRA"), under which the license was issued, provides in pertinent part:

> "(1) In order to assure that at least 50 per centum of the project power shall be available for sale and

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Power for States Neighboring New York, 30 FERC (CCH) ¶ 61,323 (March 27, 1985); *Opinion No. 229-A; Opinion and Order on Rehearing Clarifying Declaratory Opinion in Part, and Granting Petitions to Intervene Out of Time*, 32 FERC (CCH) ¶ 61,194 (July 30, 1985).

> distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance. . . .
>
> "(2) The licensee shall make a reasonable portion of the project power subject to the preference provisions of paragraph (1) . . . available for use within reasonable economic transmission distance in neighboring States, but this paragraph shall not be construed to require more than 20 per centum of the project power subject to such preference provisions to be made available for use in such States. 16 U.S.C. § 836(b)."

The "50 per centum" of project power set aside for "public bodies and nonprofit cooperatives" is called "preference power" and the entities eligible to receive it are "preference customers."

In March 1980 the Connecticut Municipal Electric Energy Cooperative ("CMEEC") and the Massachusetts Municipal Wholesale Electric Company ("MMWEC") filed complaints against PASNY and motions for partial summary judgment with FERC. Both MMWEC and CMEEC are political subdivisions of their respective states. Their states have designated them bargaining agents "for the procurement" of Niagara power for preference customers in the state. 16 U.S.C. § 836(b)(2). The complaints accused PASNY of refusing, in violation

of 16 U.S.C. § 836(b)(2), to sell preference power to the "neighboring states" of Connecticut and Massachusetts or to allocate a full 10% of the Project power to preference customers outside of New York.

In its answer PASNY conceded that Connecticut and Massachusetts were "neighboring states" and that it was allocating less than 10% of the Project's power to preference customers outside of New York. It argued, however, that its decision not to sell preference power to CMEEC and MMWEC was justified because it was already selling a "reasonable" portion of such power to preference customers outside of New York, even though the total amount sold was less than 10%. PASNY also noted that it was selling to the New York City Transit Authority ("NYCTA") and to the Metropolitan Transit Authority ("MTA") a portion of the preference power which it would otherwise have sold out-of-state. MTA is the New York State agency responsible for most of the mass transportation services available in the New York City metropolitan area.

On September 10, 1980, FERC consolidated MMWEC and CMEEC's complaints. It also granted several petitions to intervene, including those of Allegheny Electric Cooperative (Allegheny) and the Vermont Department of Public Service ("VDPS").[2] Allegheny is an organization of fourteen New Jersey and Pennsylvania rural electrical cooperatives. VDPS is a Vermont state agency responsible for purchasing power from PASNY and other power authorities. Vermont first requested Niagara power in 1960 and VDPS has been buying it since 1962. Unlike

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2 Prior to 1980 VDPS was called the Vermont Public Service Board (VPSB).

CMEEC and MMWEC, the bargaining agencies for Connecticut and Massachusetts, VDPS purchased preference power not only for preference customers but for Vermont consumers served by privately-owned utilities. Since VDPS did not own a distribution network, it did not distribute the power itself but resold the power to private utilities which in turn sold it to retail customers. It, however, "sought to assure that rural and domestic consumers within the State of Vermont [were] benefited by the low cost power made available by requiring the Vermont utilities, whether investor owned, municipals, or cooperatives, to effect rate reductions." *State of Vermont Public Service Board v. Power Authority of the State of New York*, 55 FPC 1109, 1122 (1976).[3]

FERC ruled on CMEEC and MMWEC's complaints and motions for summary judgment on February 13, 1981. *Order Granting in Part and Denying in Part Motions for Summary Disposition and Providing for*

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[3] During the course of the consolidated proceeding the presiding administrative law judge allowed several other parties to intervene. These included the Metropolitan Transit Authority (MTA), Boston Edison Company, Eastern Edison Company, Fitchburg Gas and Electric Light Company and Massachusetts Electric Company, who are appellants before this court. After FERC issued its decision, *Opinion No. 229; Declaratory Opinion and Order Affirming With Modifications Initial Decision in Niagara Preference Power for States Neighboring New York*, 30 FERC (CCH) ¶ 61,323 (March 27, 1985), it allowed yet another appellant in this case, the New Jersey Board of Public Utilities, to intervene and request a rehearing. *Opinion No. 229-A; Opinion and Order on Rehearing Clarifying Declaratory Opinion in Part, and Granting Petitions to Intervene Out of Time*, 32 FERC (CCH) ¶ 61,194 (July 30, 1985). By the time the case reached this court, FERC had allowed 16 parties to intervene. Eight of them, along with CMEEC, petitioned for review of FERC's order. In an orgy of redundancy, CMEEC and the 16 intervenors filed a plethora of briefs in this appeal. This waste and excessive burden on the court indicates the need for more restrictive orders by Staff Counsel under our Civil Appeals Management Plan as a means of avoiding unnecessary duplication.

Hearing, 14 FERC (CCH) ¶ 61,127 (Feb. 13, 1981). It held (1) that Connecticut and Massachusetts were "neighboring states" within the meaning of the NRA, (2) that PASNY could not make "substantially disproportionate allocations [of preference power] favor[ing] one neighboring state within economic transmission distance while excluding another state, [when] similar benefits are to be realized" and (3) that "[a]lthough PASNY is not required to allocate a full 10 percent of Niagara Power to out-of-state entities, it is required to allocate a reasonable amount up to 10 percent." *Id.* at p. 61,232. FERC then ordered an evidentiary hearing on the question of whether PASNY was allocating a reasonable amount of preference power to out-of-state entities and whether, given the relative benefit the preference power would confer upon different neighboring states, CMEEC and MMWEC were entitled to any, and if so, how much, power. In response to Allegheny and to the application of CMEEC and MMWEC for a rehearing, FERC reaffirmed its holding that "out-of-state [preference] entities are not always entitled, as a matter of law, to allocations aggregating a full ten percent of project power." *Order on Rehearing and Denying Motion*, 18 FERC (CCH) ¶ 61,217 at p. 61,440 (March 4, 1982). In the process, it rejected Allegheny's argument that the NRA's legislative history demonstrated that Congress intended "neighboring states" to only mean Ohio and Pennsylvania.

Administrative Law Judge George Lewnes held extensive hearings on the case throughout April and May of 1982. In March, 1983 he issued his decision. *Initial Decision of the Administrative Law Judge*, 22 FERC (CCH) ¶ 63,087 (March 9, 1983). He concluded that the "reasonable amount up to 10%" requirement obligated

PASNY to allocate the full 10% of all types of project power to out-of-state preference entities. He also adhered to FERC's earlier decision in *State of Vermont Public Service Board*, *supra*, rejecting the argument advanced by one of the intervenors in the suit, Municipal Electric Utilities Association of New York State ("MEUA") (the representatives of the New York preference customers), that VDPS, a state agency which procures power for private utilities and municipal systems, did not qualify as a preference customer. On the contrary, he held that VDPS was entitled to preference status even though it did not distribute power and had no facilities of its own. Somewhat inconsistently, however, he adopted by reference, *id.* at p. 65,289, the view that, by "public bodies" the NRA meant "governmental entities that resell and distribute the preference power to the people as consumers of such power." *Opinion No. 151; Declaratory Opinion and Order Affirming with Modifications Initial Decision in Niagara Preference*, 21 FERC (CCH) ¶ 61,021 at p. 61,129 (Oct. 13, 1982) (FERC decision considering challenges to PASNY's allocation of power to preference customers in New York State). Accordingly he held that the MTA, which was not a power distributor but a user, was not entitled to preference power. FERC had previously so held, for the same reasons, in *Opinion No. 151*, *supra*, but, when the MTA argued that it had not been given adequate notice prior to *Opinion No. 151* that its status as a preference customer would be adjudicated, FERC voided its decision and ordered the question of MTA's status to be decided in the MMWEC and CMEEC dockets. *Opinion No. 151-A; Order on Rehearing Modifying Declaratory Opinion and Order on Niagara Preference With Respect to the Remedy*, 23 FERC (CCH) ¶ 61,031 (April 6, 1983)).

Upon review, FERC affirmed Judge Lewnes in most regards. *Opinion No. 229; Declaratory Opinion and Order Affirming With Modifications Initial Decision on Niagara Preference Power for States Neighboring New York*, 30 FERC (CCH) ¶ 61,323 (March 27, 1985). It reiterated its earlier holdings that Massachusetts and Connecticut were "neighboring states" and that PASNY was not required, as a matter of law, to allocate 10% of the preference power to out-of-state entities. *Id.* at p. 61,645-47. FERC agreed with Judge Lewnes, however, that PASNY would not be acting reasonably under the current circumstances if it allocated less than 10% of the power to those out-of-state entities. FERC rested its finding on the fact that "New York State preference customers would not need 40 per cent of the project power until the winter of 1986/87 . . . [and that] PASNY will be acting arbitrarily and unreasonably if it sells preference power to non-preference customers in New York State while refusing to provide out-of-state preference customers the maximum amount of power available to them under the NRA. [Otherwise], the congressional intent to allocate 50 percent of the project power to preference customers [would be] defeated by PASNY's allocation decisions." *Id.* at p. 61,646. It accordingly ordered that, as of July 1, 1985 (the expiration date of many of PASNY's contracts to sell power generated by the Niagara and St. Lawrence Power Projects), PASNY must sell 10% of the Niagara power to preference customers outside of New York.

Since the New York preference customers had never used 40% of the preference power, it was implicit in FERC's holding that PASNY had not been selling enough preference power out of state for some time. FERC,

however, refused the out-of-state preference customers' demand that it order PASNY to sell to CMEEC and MMWEC an extra allotment of power in the future to make up for the past shortfall. It reasoned that "since the supply of preference power and/or energy is finite, any recompense would be at the expense of other customers. [I]t would be unduly punitive to reduce the allocations of customers which were not at fault." *Opinion 229*, *supra*, 30 FERC at p. 61,656.

FERC agreed with the ALJ that the MTA was not a "public body" entitled to preference power. Overruling its earlier decision in *State of Vermont Public Service Board*, *supra*, it also held that neither was VDPS. Relying in part on our decision in *Power Authority of the State of N.Y. v. F.E.R.C.*, 743 F.2d 93 (2d Cir. 1984) (reviewing *Opinion No. 151*, *supra*, and *Opinion No. 151-A*, *supra*) FERC decided that Congress intended the term "public bodies" to mean "public distribution systems" or "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail." *Opinion No. 229*, *supra*, 30 FERC at p. 61,651. It found that Congress included the preference provisions in the NRA to foster "yardstick competition." The principle of yardstick competition is that "if the municipal entities (as distinguished from the end-users) are supplied with cheap hydropower their lower competitive rates will force the private utilities in turn to reduce their rates, with resulting benefits to all, including rural and domestic consumers." *Power Authority of the State of N.Y.*, *supra*, 743 F.2d at 105. FERC concluded that neither MTA, a government entity which used all the preference power it received, nor VDPS, an entity which resold the power to private utilities, could compete with the private utilities or provide

"yardstick competition." Accordingly, MTA and VDPS were not "preference customers" within the meaning of the NRA.

Virtually every party to *Opinion 229* and several movants for intervention asked FERC for a rehearing. FERC complied and, in *Opinion 229-A; Opinion and Order on Rehearing Clarifying Declaratory Opinion in Part, and Granting Petitions to Intervene Out of Time*, 32 FERC (CCH) ¶ 61,194 (July 30, 1985), affirmed its earlier opinion.

Shortly before *Opinion 229-A* was rendered, the Vermont legislature authorized VDPS "to distribute and sell at retail electrical energy purchased from the Niagara and St. Lawrence power projects directly to all rural and domestic consumers of electricity in Vermont by entering into agreements with Vermont electrical utilities that include, without limitation, the leasing of facilities and the providing of services to the department to distribute such electrical energy." 30 V.S.A. § 212a. The law was intended to bring the Board within FERC's definition of "public body." In *Opinion 229-A* FERC expressly declined to rule on whether the legislature had succeeded, *Opinion 229-A*, *supra*, 22 FERC at n.12, and the question is not before us on this appeal.

DISCUSSION

Appellants raise four challenges to *Opinion 229* and *Opinion 229-A*. MTA and a collection of Massachusetts utilities[4] challenge FERC's conclusion that MTA and

[4] Boston Edison Company, Eastern Edison Company, Fitchburg Gas and Electric Light Company and Massachusetts Electric Company.

(footnote continued on following page)

VDPS are not "public bodies" entitled to preference power. Allegheny challenges FERC's holding that the term "neighboring states" includes states other than Pennsylvania and Ohio. It also seeks to challenge FERC's view that PASNY is not required, as a matter of law, to allocate 10% of the Project power to preference customers outside of New York State. Finally, CMEEC challenges FERC's conclusion that CMEEC and MMWEC are not entitled to retroactive relief for PASNY's past failure to sell a "reasonable" amount of preference power to out-of-state entities.

The Definition of Public Bodies

As a general rule, a statute should be read according to its literal terms, *United States v. Locke*, ____ U.S. ____, 105 S. Ct. 1785, 1792 (1985); *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980), unless this produces an interpretation which makes little sense, *Chemical Mfrs. Ass'n v. Natural Res. Defense Coun.*, ____ U.S. ____, 105 S. Ct. 1102, 1108 (1985); *United States v. Turkette*, 452 U.S. 576, 587 (1981), does violence to the purposes Congress sought to serve by the statute, *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979), or is otherwise "demonstrably at odds with the intentions of [the statute's] drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). *See also Locke, supra*, 105 S. Ct. at 1792; *Bread Political Action Committee v. F.E.R.C.*, 455 U.S. 577, 580 (1982); *Consumer Product Safety Commis-*

Since Massachusetts has planned to form an agency similar to VDPS (prior to the Vermont legislature's recent change in that organization) these Massachusetts companies would stand to benefit if the former VDPS were held to be a "public body".

sion, *supra*, 447 U.S. at 108. Literally, the term "public bodies" is not limited to "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail." However, the legislative history of the NRA demonstrates that that is what Congress intended the term to mean.

As we noted in *Power Authority of State of N.Y.*, *supra*, 743 F.2d at 105, Congress' intent in adopting the NRA's preference provisions was to foster "yardstick competition." S. Rep. No. 539, 85th Cong., 1st Sess. 7 (1957) ("S. Rep."); *Development of Power at Niagara Falls, N.Y.: Hearings Before a Subcommittee of the Committee on Public Works on S. 512 and S. 1037*, 85th Cong., 1st Sess. 12-13 (1957) ("S. Hearings") (Sen. Clark); 103 Cong. Rec. 14438 (1957) (Sen. Chavez).[5] Congress believed that it was necessary to create "publicly owned power" because "electric-power distribution tends to be a monopoly, and . . . the only way to gain for the consumer the normal benefits that . . . flow from competition is to develop public-power 'yardsticks' ". Minority Views of Senator Richard L. Neuberger, S. Rep., *supra*, at 10.[6] *See also* S. Hearings, *supra*, at 12-13 (Sen. Clark). The municipal utilities, Congress hoped,

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5 Witnesses who testified before Congress emphasized that the preference provision was designed to foster yardstick competition. *See* S. Hearings, *supra*, at 269 (Statement of Edward Lindey, President, Central Electric Cooperative, Pa.); *id.* at 282 (Statement of Clyde Ellis, General Manager, National Rural Electric Cooperative Association); *id.* at 305 (Statement of Alex Radin, General Manager, American Public Power Association); *id.* at 314 (Statement of Leland Olds, Director, Energy Research Associates).

6 Senator Neuberger did not differ from the majority in his view of why a preference provision was necessary. He only disagreed with the Senate's conclusion that the provision should only apply to 50% of the Project power. *Power Authority of the State of New York*, *supra*, 743 F.2d at 101; S. Rep., *supra*, at 10.

would act as yardsticks by using their supply of hydropower to charge rates which would force the private utilities to reduce their prices or at least serve as a measure by which regulators could set the private utilities' rate of return. *Power Authority of the State of New York*, *supra*, 743 F.2d at 105.

Yardstick competition would exist if publicly-owned utilities competed against privately-owned utilities in selling power to ultimate consumers. If the "public body" uses the preference power itself, the privately-owned utilities would not face any pressure to reduce the prices they charge other customers. Similarly, if the "public body" simply resold the preference power to the privately-owned utilities (as did VDPS) the preference power would not have fostered competition. As Senator Neuberger observed, "public generation is not enough. The power must be made available to public and cooperative distributing systems, so that the public operation will extend from the turbine to the reading lamp in the living room. Only in that way is competition established." S. Rep., *supra*, at 10. *See also* S. Hearings, *supra*, at 12-13 (Sen. Clark). Indeed, if preference power were made available to all government bodies, whether or not they distributed that power to consumers, every town and local library would be entitled to claim a direct share. Niagara hydropower would be spread so thin that any competitive effect it might have had would be lost.

Accordingly, at least one senator stated that the preference clause gave priority to "municipalities which purchase or generate and sell their own power", 103 Cong. Rec. 14440 (Sen. Clark), as did congressmen and experts who treated "municipal utility", "municipal plant", "municipal electric system", and "municipal system" as

synonymous with "public body" in their testimony. S. Rep., *supra*, at 10 (Sen. Neuberger); S. Hearings, *supra*, at 81 (Sen. Clark); *id.* at 23 (Sen. Neuberger); *id.* at 254 (Blaine Stockton, President, New York State Association of Rural Electric Cooperatives); *id.* at 282 (Clyde Ellis, General Manager, National Rural Electric Cooperative Association); 103 Cong. Rec. 13205 (Rep. Chudoff); *id.* at 13209 (Rep. Ryrd); 103 Cong. Rec. 14439 (Sen. Ives); *id.* at 14444 (Sen. Javits). In fact, it was implicit throughout the debates that "public bodies" were publicly-owned entities capable of distributing the preference power they received. The primary argument made by critics of the preference provision was that the provision would foster inefficiency by encouraging municipalities to qualify as buyers of preference power by building transmission lines and electric plants duplicating those of the privately-owned utilities. S. Hearings, *supra*, at 20 (Sen. Ives); *id.* at 32 (Rep. Miller); *id.* at 156 (Sen. Javits); *id.* at 237 (Andrew McMahon of Utility Workers Union of America, AFL-CIO). Obviously, that argument would have had little force if government bodies could receive the power whether or not they had the means to distribute it.[7]

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[7] We also note that Congress considered the NRA's preference provision to be a standard "federal-type" preference. *Power Authority of the State of New York*, *supra*, 743 F.2d at 105. The federal power acts adopted prior to the NRA seem to have equated "public bodies" with publicly-owned utilities. Several contained provisions stating that public bodies should not be denied an allotment of preference power "on the ground that any proposed bond or other security issue of any such public body or cooperative, the sale of which is necessary to enable such prospective purchaser *to enter into the public business of selling and distributing the electric energy proposed to be purchased*, has not been authorized or marketed, until after a reasonable time, . . . has been afforded such public body or cooperative to have such bond or other security issue authorized or marketed." The Bonneville Project, 16 U.S.C. § 832c. (Emphasis supplied). *See also* The Boulder

The MTA argues that the yardstick competition theory makes little sense in today's energy market because the disparity between the low cost of hydropower and the higher cost of privately-produced power makes competition between the two close to impossible. In view of Congress' crystal clear intent to adopt the NRA's preference provision in order to create yardstick competition, that argument must be rejected. Assuming *arguendo* the improbability of such competition (although we take judicial notice of the recent sharp decline in the price of oil as a source of private power) "[i]t is not for FERC or ourselves to second-guess [Congress'] basic determination." *Power Authority of the State of New York*, *supra*, 743 F.2d at 105. Any rectification lies exclusively with Congress.

MTA also argues that, since one congressman noted that the bill made "provision for dealing with industrial and defense emergencies", 103 Cong. Rec. 13203 (Rep. Dooley) and a second referred to "defense projects or Government installations" as possible recipients of the preference power, *id.* at 14448 (Sen. Kerr), Congress could not have intended that preference power be made available only to public bodies capable of distributing the

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Canyon Project, 43 U.S.C. § 617d(c); Tennessee Valley Authority, 16 U.S.C. § 831k.

These provisions assume that a public body cannot receive preference power unless it has entered "into the business of selling and distributing . . . electric energy". Otherwise, if these bodies were entitled to purchase federal power without entering into the business of distributing it to others, such provisions would have been superfluous.

Similarly, provisions in federal power acts permitting a public body to resell power to nonpreference customers, subject to a priority for public bodies, *see*, *e.g.*, the Bonneville Act, 16 U.S.C. § 832d, are consistent with the requirement that the public bodies be distributors. Indeed, we held in *PASNY Public Authority of the State of New York*, *supra*, 743 F.2d at 104-05, that municipal utilities purchasing hydropower from PASNY may resell it to industrial users.

power to customers. The MTA reads too much into the congressmen's remarks. An earlier version of the NRA, S. 512, 85th Cong., 1st Sess. (1957) required that PASNY should give "preference for the purchase of [Niagara Project] power to . . . the defense agencies of the United States." Representative Dooley and Senator Kerr apparently believed that the provision finally adopted retained that preference. S. 512, however, never offered a preference to non-defense related government bodies which did not distribute the power to consumers. Accordingly, even if the NRA's preference provision should be read in light of S. 512, the congressmen's remarks do not suggest that non-defense bodies such as the MTA and VDPS merit preference power.

We therefore affirm FERC's conclusion that the term "public bodies" in 16 U.S.C. § 836(b)(1) means "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail." MTA does not contend that it satisfies that definition and VDPS does not argue that it satisfied the definition prior to the passage of 30 Vt. Stat. Ann. § 212a, *see supra* at 13. Neither MTA nor VDPS were purchasing hydropower from PASNY for resale to customers at retail. MTA was not reselling the power at all. By reselling power to private utilities VDPS was lessening any potential competition on their part in the distribution of the power which might occur if the preference power were distributed through municipal utilities. Accordingly, we affirm FERC's conclusion that VDPS, as constituted prior to 1986, and MTA are not "public bodies" entitled to purchase preference power from PASNY.[8]

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8 The other arguments advanced in support of the claim that the term "public body" should be construed to include a consumer such as MTA

The Definition of "Neighboring States"

Title 16 U.S.C. § 836(b)(2) requires PASNY to provide preference power "for use within reasonable economic transmission distance in neighboring states." Unlike Congress' use of the term "public bodies", there is no evidence that it intended "neighboring states" as used in this phrase to have any meaning other than its literal one: states found to be within reasonable geographical proximity of New York, after taking into account all relevant factors and whether they are within reasonable economic transmission distance. Massachusetts and Connecticut border New York and fall within that definition. Allegheny argues, however, that the NRA's legislative history reveals that Congress meant "neighboring states" to only refer to Pennsylvania and Ohio. We disagree.

In 1957 there was some doubt about what the "economic transmission distance" was for Niagara hydropower, but congressmen and witnesses agreed that it was between 150 and 400 miles.[9] Accordingly, Congress

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merit little discussion. The NRA's provision of a rate-setting mechanism for resale of project power by municipal utilities to nonpreference customers, 16 U.S.C. § 836(b)(5), is irrelevant to the definition of a public body. The NRA does not require FERC to ignore yardstick competition in favor of subsidizing mass transit, as MTA argues, or to classify the MTA as a "public body" under the Act on the ground that this will promote environmental considerations by enabling the MTA to avoid using more expensive fuel. Congress' intent controls. *See City of Santa Clara v. Andrus*, 572 F.2d 660, 679-80 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978). Moreover, even if MTA's subways were permitted to buy the cheaper hydropower directly (rather than from a distributor of preference power), other customers would then be forced to use the more expensive fuel claimed to pollute the environment.

9 S. Hearings, *supra*, at 26, 56 (Rep. Miller) (150 miles); *id.* at 131 (Robert Moses, Chairman of the New York Power Authority) (same); *id.* at 176 (Thomas Moore, General counsel, New York Power Authority) (same); 103 Cong. Rec. 13196 (Rep. Blatnik) (same); *id.* at 13196 (Rep. Chudoff) (150-300 miles); *id.* at 13198 (Rep. McGregor) (150-400

acknowledged when adopting the NRA that for a time only customers in western Pennsylvania and northeastern Ohio would receive power under § 836(b)(2). *See, e.g.*, S. Rep., *supra*, at 5, 6; H. Rep. No. 862, 85th Cong., 1st Sess., *reprinted in* 1957 U.S. Code Cong. & Ad. News 1587, 1592, 1593.[10]

No congressman suggested, however, that § 836 meant that Niagara power should always be available only to those limited areas which happened to be within economic transmission distance in 1957. To the contrary, congressmen acknowledged that economic transmission distances were mutable, S. Hearings, *supra*, at 176 (Dialogue between Sen. Cotton and Thomas Moore, Counsel for New York Power authority); *id.* at 15 (Sen. Ives), and rejected a suggestion that § 836(b)(2) be amended to provide that Niagara power would only be available to the portions of "neighboring states" within 300 miles of the Project. 103 Cong. Rec. 13196-97. Several congressmen stated that states other than Ohio and Pennsylvania could receive power if they were within economic transmission distance. 103 Cong. Rec. 13204 (Rep. Miller states Massachusetts would receive power if it could prove it was within economic transmission distance); *id.* at 13198 (Letter read into record responding to Sen. Clark's claim that Niagara power could be sold to preference customers in Michigan); *id.* at 13211 (Rep.

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miles); *id.* at 14440 (Sen. Clark) (150-300 miles); *id.* at 14443 (Sen. Javits) (150 miles).

10 *See also* 103 Cong. Rec. 13195 (Rep. Buckley); *id.* (Rep. Blatnik); *id.* at 13198 (Rep. McGregor); *id.* at 13205 (Rep. Kluczynski); *id.* at 13206 (Rep. Ostertag); *id.* at 13208 (Rep. Flood); *id.* at 14439 (Sen. Ives); *id.* at 14439-40 (Sen. Clark); *id.* at 14445 (Sen. Neuberger); *id.* at 14454 (Sen. Carroll); *id.* at 14450 (Sen. Kerr); *id.* at 14455 (Sen. Martin); *id.* at 14452 (Sen. Lausche).

McGregor suggests Indiana could receive Niagara power). *See also* S. Hearings, *supra*, at 131 (Robert Moses notes that Massachusetts and New Hampshire decided not to request Niagara power because they were not within economic transmission distance). Senator Chavez expressed the hope that Niagara power would lower power rates and increase electricity use in New England and "a large part of the northeastern section of our country", 103 Cong. Rec. 14438, strongly suggesting that he intended Niagara Project power to be available to portions of "neighboring states" other than the northwestern corner of Pennsylvania and the northeastern tip of Ohio.

The Amount of Power PASNY Must Allocate to Preference Customers Outside New York

Allegheny argues that PASNY is required as a matter of law to sell 10% of the Niagara Project power to preference customers outside of New York, so long as those customers are willing to buy the power. PASNY, on the other hand, relying on the language of 16 U.S.C. § 836(b)(2), which obligates PASNY to make available to preference users outside of New York a "reasonable portion of the project power" not to exceed 10%, takes the position that 10% is not so mandated at all times since a reasonable portion might sometimes be less than 10%. The issue is rendered currently academic for the reason that FERC and PASNY both agree that at the present time it would be unreasonable for PASNY to sell less than 10% of the Project's power to out-of-state customers. All parties, therefore, conceded that PASNY must presently sell 10% of the Project power out-of-state. Accordingly, Allegheny's appeal amounts to no more than a request for a declaration that its construction of

§ 836(b)(2) is more rational than that of FERC or PASNY. Since to do so would be a mere academic exercise that could not "affect the result as to the thing in issue in the case," *Village of Ilion v. FERC*, Dkt. No. 85-4143, Slip Op. 3115 at 3127 (2d Cir. May 5, 1986) (quoting *California v. San Pablo & Tulare Railroad*, 149 U.S. 308, 314 (1893)), we dismiss Allegheny's argument as moot.

Finally, CMEEC contends that FERC erred in failing to order PASNY to sell to MMWEC and CMEEC an extra allotment of Niagara power to compensate it for PASNY's past failure to sell them Niagara power that they had a right to buy. FERC denied CMEEC and MMWEC retroactive relief for the reason that, since the pool of preference power is finite, granting CMEEC and MMWEC an extra allotment would take power from the pocket of other preference customers and thus improperly penalize them for a wrong which PASNY, not they, had committed.

Though FERC's remedial actions must "be reasonably commensurate with the needs of the case," and their purpose must not be "to punish or confer a windfall on the complainant," it has "broad discretion in determining what relief is appropriate to remedy a violation of the NRA." *Power Authority of the State of New York*, *supra*, 743 F.2d at 112. *See also Niagara Mohawk Power Corp. v. Federal Power Com'n*, 379 F.2d 153, 159 (D.C. Cir. 1967). We do not believe that FERC abused its discretion in the present case. FERC's decision, that preference customers (and the end-users they serve) should not suffer because at some time in the past PASNY sold them power which should have gone to CMEEC and MMWEC, is reasonable. CMEEC's suggestion that those customers

were somehow at fault because they applied to PASNY for the power does not alter our view.

CONCLUSION

We affirm FERC's holding (1) that, for purposes of 16 U.S.C. § 836(b) "public bodies" are "publicly-owned entities capable of selling and distributing power directly to consumers of electricity at retail", *not* consumers or brokers, (2) that Connecticut and Massachusetts are "neighboring states", and (3) that CMEEC and MMWEC are not entitled to retroactive relief for PASNY's past failure to sell them Niagara power. We dismiss as moot Allegheny's claim that PASNY is required, as a matter of law, to sell 10% of the power produced by the Niagara Project to preference customers outside of New York.

APPENDIX C

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. EL80-19-000, -004, -005, -006, -007, -008, -011, -009, -012, -013, -014, -015, and -016

MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY

v.

POWER AUTHORITY OF THE STATE OF NEW YORK

Docket No. EL80-24-000, -003, -004, -005, -006, -007, -009, -010, -011, -012, -013, and -014

CONNECTICUT MUNICIPAL ELECTRIC ENERGY COOPERATIVE

v.

POWER AUTHORITY OF THE STATE OF NEW YORK

Docket No. EL78-24-029, -032, -033, -034, -035, -036, -038, -039, -040, -041, and -042

MUNICIPAL ELECTRIC UTILITIES ASSOCIATION OF NEW YORK

v.

POWER AUTHORITY OF THE STATE OF NEW YORK

OPINION NO. 229-A, OPINION AND ORDER ON REHEARING CLARIFYING DECLARATORY OPINION IN

PART, AND GRANTING PETITIONS TO INTERVENE OUT OF TIME

(Issued July 30, 1985)

Before Commissioners:

In Opinion No. 229, 30 FERC ¶ 61,232 (March 27, 1985), we determined that the Power Authority of the State of New York (PASNY) had failed to allocate a reasonable amount of low cost hydropower from the Niagara Project No. 2216 for "public bodies" and nonprofit cooperatives in states neighboring New York. We further defined the term "public bodies" as "publicly-owned sellers and distributors of electricity at retail," thereby determining that neither the Vermont Department of Public service (VDPS) nor the Metropolitan Transportation Authority (MTA) could qualify as a "public body" within the purview of the Niagara Redevelopment Act (NRA). While we did not order any retroactive relief, we instructed PASNY that on July 1, 1985, it must make available to preference customers in states neighboring New York ten percent of every classification of Niagara power and energy sold, and to allocate that power and energy among those customers according to the respective numbers of domestic and rural consumers.

On April 24, 25, and 26, 1985, the parties,[1] and three movants for late intervention,[2] filed requests for rehearing

[1] Rehearing petitions were filed by the New York Industrials (as identified in note 4 of Opinion No. 229), the Metropolitan Transportation Authority, the Power Authority of the State of New York, the Vermont Department of Public Service, Connecticut Municipal Electric energy Cooperative (CMEEC), the Massachusetts Group (as identified in note 2 of Opinion No. 229), Allegheny Electric Cooperative, Inc. (Allegheny), and Massachusetts Municipal Wholesale Electric Company (MMWEC). In this Opinion, these petitions will be cited as (Party's) Rehearing at ___.

[2] Public Service Electric and Gas Company (PSE&G), the New Jersey Board of Public Utilities (NJBPU), and Rockland Electric Company

pursuant to Rule 713 of the commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713. On May 15, 1985, the Rhode Island Attorney General and Public Utilities Commission (Rhode Island PUC) filed a motion for leave to intervene out of time and a motion to join in some of the requests for rehearing that had already been filed. We granted rehearing on May 22, 1985, for the limited purpose of allowing sufficient time to consider the numerous significant issues raised in these petitions for rehearing. 31 FERC ¶ 61,215. At the same time, we denied a request for a stay of the effective date of Opinion No. 229. *Id.*

NJBPU and Rhode Island PUC are designated state bargaining agencies. They each assert that they have negotiated with PASNY to purchase preference power beginning in July 1985, which they intend to distribute to all residential electric consumers in their state. They claim they made these arrangements in reliance upon *State of Vermont Public Service Board v. Power Authority of the State of New York*, 55 F.P.C. 1109 (1976) (*Vermont*). Noting that Opinion No. 229 will preclude them from purchasing power for distribution through investor-owned utilities, they request permission to intervene at this time. The other three movants for late intervention are investor-owned utilities in New Jersey that wish to obtain for their customers some of the low cost hydropower through NJBPU.

Although we find that these interests are adequately represented here by PASNY, the other state bargaining agencies, and other investor-owned utilities, we will grant these untimely motions to intervene because Opinion No. 229 overruled, in relevant part, our *Vermont* decision upon which these movants claim reliance. Moreover, since they were not purchasers of Niagara preference power during

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(Rockland) sought rehearing and moved to intervene out of time. Atlantic City Electric Company (Atlantic City) moved to intervene out of time, but did not petition for rehearing.

the 1980-1985 contract period that was initially the focus of this proceeding, we understand why they did not move to intervene more promptly. Under the circumstances, we find they have demonstrated good cause for failing to intervene in a timely manner. Late intervention at this stage will simply permit the three of these parties who filed timely petitions for rehearing to be heard now and to seek redress of their grievances in a court of appeals,[3] and will not disrupt the proceeding or otherwise burden the existing parties.

I. OPINION NO. 229 PROPERLY CONSTRUED THE NIAGARA REDEVELOPMENT ACT.

Opinion No. 229 is criticized as being internally inconsistent for interpreting "neighboring States" according to its plain meaning, while resorting to legislative history to restrict the asserted plain meaning of "public bodies." Allegheny Rehearing at 6-8; Boston Edison Rehearing at 17; and PASNY Rehearing at 4. Seven petitions for rehearing request the Commission to reverse its definition of the term "public bodies," and to interpret the phrase broadly according to common usage. Bethlehem Steel Rehearing at 2; Boston Edison Rehearing at 17; MTA Rehearing at 7; NJBPU Rehearing at 6-8; PASNY Rehearing at 3-4; Rockland Rehearing at 7; VDPS Rehearing at 8-14. However, because we followed the same fundamental principles of statutory construction in interpreting both terms, these holdings are internally consistent.

A. "Neighboring States" Was Correctly Defined According to Its Plain Meaning.

The *Vermont* decision, 55 F.P.C. at 1113, construed the NRA according to its plain meaning. Although we rec-

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[3] Rhode Island PUC's untimely motion to "join in" the timely petitions for rehearing cannot be granted, however. The Federal Power Act (FPA), 16 U.S.C. § 825l(a), has a strict thirty-day deadline for rehearing petitions, which cannot be extended. *Cf.* Montana-Dakota Utilities Co. v. FERC, 739 F.2d 376, 380 (8th Cir. 1984) (Natural Gas Act).

ognized in Opinion No. 229 that an agency may change its interpretation of a statute over time, so long as the new interpretation is consistent with Congressional intent, slip op. at 12, we did not invoke this power lightly. Rather we were mindful that any departure from the doctrine of *stare decisis* demands special justification," *Arizona v. Rumsey,* 104 S. Ct. 2305, 2311 (1984). Opinion No. 229 therefore reviewed both the rationale of the *Vermont* decision and subsequent judicial precedent interpreting the NRA to determine whether any special circumstances compelled abandonment of our interpretation of the term "neighboring States" according to its plain meaning.

Our analysis in *Vermont* and in Opinion No. 229 started with the language of the NRA itself, as it must. *Watt v. Alaska,* 451 U.S. 259, 265 (1981). A literal reading of "neighboring States" did not "produce a result demonstrably at odds with the intentions of the drafters." *Griffin v. Oceanic Contractors, Inc.,* 458 U.S. 564, 571 (1982). "The circumstances of the enactment" did not persuade us "that Congress did not intend words of common meaning to have their literal effect." *Watt,* 451 U.S. at 266. Rather, our review of the legislative history convinced us that Congress did not intend to restrict this commonly-understood broad term to refer only to Ohio and Pennsylvania.[4] We did not find that the use of the literal mean-

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[4] We are unable to agree with Allegheny's argument:

> Ohio and Pennsylvania were the only two States of the nine States which supply the waters which flow over the Niagara Falls, which were then and are now so geographically located as to receive the Niagara power. Not one drop of water flows from any of the New England States to the Niagara River, nor from any other State which borders New York . . . [T]his fact caused Congress in the legislative history to include only Ohio and Pennsylvania in the term 'neighboring states.'

Allegheny Rehearing at 12. While Allegheny's citations, *id.* at 13-14, establish that the regional character of the Niagara resource caused Congress to require the exportation from New York of some of the

ing of the phrase "neighboring States" would lead to "absurd results" or would otherwise "thwart" the obvious purpose of the statute. Opinion No. 229, slip op. at 9, *quoting Commissioner v. Brown,* 380 U.S. 563, 571 (1965). We were convinced that "Congress meant what it said," and that the legislature did not suggest an intent contrary to the words chosen by Congress. *Id.* Accordingly, we deferred to the supremacy of the legislature, *see United States v. Locke,* 105 S. Ct. 1785, 1792 (1985), recognizing that the legislative purpose is generally expressed by the ordinary meaning of the words Congress uses. *Richards v. United States,* 369 U.S. 1, 9 (1962).

B. "Public Bodies" Must Be Defined In the Context of the Statute and its History.

The analysis of the term "public bodies" did not begin any differently. Both *Vermont,* 55 F.P.C. at 1113, and the initial decision in this case, Initial Decision at 21, read "public bodies" broadly, finding that construction consistent with the purposes of the statute. They each treated VDPS as a "public body" under the NRA because VDPS

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power to states including Ohio and Pennsylvania, they do not support Allegheny's contention that Congress limited the availability of the power only "to Ohio and Pennsylvania." Indeed, Allegheny admits that those two states do not alone supply the water for Niagara Falls. *Id.* at 12. During the House debate on the compromise bill, Congressman McGregor of Ohio referred to Indiana twice as a potential recipient of Niagara preference power. 103 Cong. Rec. at 13,211 (July 31, 1957). Allegheny's claim that "neighboring States" means "only Ohio and Pennsylvania" is inconsistent with Congressman McGregor's statement and the other portions of the legislative history cited in Opinion No. 229, and is also inconsistent with Allegheny's past actions procuring preference power on behalf of a nonprofit cooperative in New Jersey.

Furthermore, the 1957 hearings on the Clark and Ives-Javits bills establish that PASNY was looking toward the east to sell Niagara power, rather than to the south and west beyond Pennsylvania and Ohio, but Massachusetts and New Hampshire dropped out after their consultants determined that they were not then within economic transmission distance. Hearings at 116-17.

was causing the Niagara preference power it acquired to be distributed to all domestic and rural customers in Vermont, a result that was deemed to achieve the purpose of the NRA.

When *PASNY v. FERC,* 743 F.2d 93 (2nd Cir. 1984), rejected PASNY's contention that the NRA's preference power was to be resold exclusively to such consumers, and instead determined that Congress had created a federal-type preference, not an end-use preference, *id.* at 104-05, the Second Circuit provided the "special justification" compelling us to depart from our prior literal interpretation of the term "public body," and to seek guidance from the legislative history in determining congressional intent. *See Arizona,* 104 S. Ct. at 2311.[5]

The term "public bodies" is not as unambiguous as the parties suggest.[6] The Supreme Court has held that "nom-

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[5] Contrary to the contentions of Boston Edison at 8, NJBPU at 11-12, and VDPS at 14 and 17, we did not read the Second Circuit's decision to be determinative on the key question presented here: What did Congress mean when it used the term "public bodies" in the NRA? We were well aware that issue was not presented in the *PASNY* case, and would be resolved first in this proceeding. Thus, while the Second Circuit's opinion dictated the reappraisal, the court's decision did not compel us to reach any specific conclusion. Rather, it was our own reevaluation of the statute and its legislative history in this case which dictated the result we reached. *See* Opinion No. 229, slip op. at 13-15. At the same time, however, there was no reason we should have refrained from taking advantage of the court's analysis of the legislative history. As the Supreme Court explained in Aaron v. SEC, 446 U.S. 680, 689-90 (1980), even when the issue presented in the present case was expressly reserved in a prior case, we "nonetheless must be guided by the reasoning of that decision."

[6] In *PASNY,* the Second Circuit identified yardstick competition as a key goal of Congress in the NRA. 743 F.2d at 105. If we were to adopt the definition of "public body" that MTA advances, Rehearing at 9, that is, a "group of individuals organized to serve people or some community interest affecting people," we would be permitting Congress' intent to be circumvented. Such a broad distribution of prefer-

inal public entities" can be public bodies in order to obtain bond financing without being transform[ed] into the type of governmental body for which the Fourteenth Amendment demands a one-person, one-vote system of election." *Ball v. James*, 451 U.S. 355, 368 (1981) (footnote omitted). Thus, the question is not how the dictionary defines the term, but how it should be understood in context.

Since the *PASNY* opinion determined that this was a federal-type preference, 743 F.2d at 105, we analyzed how this federal-type preference developed in other statutes. Opinion No. 229, slip op. at 13-14.[7] We found that congress

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ence power would reduce the efficacy of this preference power to act as a competitive spur.

[7] In Opinion No. 229, we relied in part on the fact that the Bonneville Power Act "appears to limit the meaning of 'public bodies' to *distributors* of electric energy." Slip op. at 13 (citing 16 U.S.C. § 832c(d)) (emphasis in original). MTA disagrees, noting that the Bonneville Act's definition of "public bodies" includes state agencies. MTA Rehearing at 16. MTA claims that the "reasonable time" provision we cited was only intended "to assure that potential intended recipients of preference power who were at the time of enactment not yet physically capable of receiving that power did not lose their right to receive the power because of the initial unreadiness." *Id.* at 18. MTA concludes that "[t]here is nothing in the reasonable time provision which requires the conclusion that public bodies had to be distributors." *Id.* at 19. We disagree. As the Attorney General's decision cited in Opinion No. 229, slip op. at 14, recognized, the reasonable time provisions were designed to permit preference customers to purchase preference power "on condition that such customer will, within a reasonable time to be fixed by the Secretary [of the Interior], obtain the means for taking and delivering the power." 41 Op. Att'y. Gen. 236, 244 (1955). Indeed, the legislative history of the Bonneville Act makes a similar point. The House Report, H.R. Rep. No. 2955, 74th Cong., 2d Sess. 3 (1937) makes clear that the Act permits sales of preference power "to States and political subdivisions of States . . . but for the major and primary purpose of supplying electrical energy to their members as nearly as possible at actual cost." Thus, we believe Congress contemplated that preference customers would be retail distributors, not end-users or conduits for the transfer of preference power to investor-owned utilities. *Accord*, Fereday, *The Meaning of the Preference Clause in Hydroelectric*

used the term "public bodies" to refer to municipal utilities, that is, publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail." *Id.* at 14.[8] Any other interpretation of "public bodies" would lead to absurd results and would thwart the purposes of the NRA, as those purposes have been defined by the Second Circuit in *PASNY*.

While the statute permitted the allocation of preference power for sale to investor-owned utilities in periods of surplus, the NRA made clear that investor-owned utility companies are not the intended beneficiaries of the fifty percent of the Niagara Project's power that Congress set aside for preference customers. 16 U.S.C. § 836(b)(1). Congress did not intend to provide preference power to the customers of investor-owned utility companies. Congress believed that these customers would benefit indirectly from the additional competition in the marketplace. *PASNY*, 743 F.2d at 105. Indeed, in construing a similar preference clause in the Reclamation Project Act of 1939, the Ninth

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Power Allocation Under the Federal Reclamation Statutes, 9 Envtl. L. 602, 631-32 (1979).

[8] We do not agree with MTA, Rehearing at 24 (quoting 103 Cong. Rec. 14,448 (August 12, 1957)), that Senator Kerr "referred to preference being given to" defense projects and government installations. He said that "municipalities and defense projects or Government installations and REA cooperatives" in New York would like to utilize the preference power almost as much as their counterparts in the nearby areas of Pennsylvania and Ohio. The Clark and Javits bills both proposed an express preference for "defense agencies of the United States." However, as discussed in Opinion No. 229, slip op. at 15, the omission from the NRA of this particular preference, and the particular manner in which the project power was divided, demonstrate conclusively that "defense projects or Government installations" are not included within the purview of the Niagara preference for "public bodies." This is in accord with Congress' treatment of federal agencies under the Flood Control Act of 1944, 16 U.S.C. § 825s, and, according to one commentator, is consistent with Congress' treatment of federal agencies under the Bonneville Act, although that question has not been decided yet. Fereday, 9 Envtl. L. at 637-38 and n. 136.

Circuit explained that [i]t is only if the available supply [of preference power] exceeds the demands of interested preference customers that the Secretary [of the Interior] may offer federal power to private entities." *City of Santa Clara v. Andrus,* 572 F.2d 660, 670 (9th Cir.), *cert. denied,* 439 U.S. 859 (1978). Moreover, that court found the preference provision was violated by a banking arrangement which permitted a private utility to profit from the low cost cost of federal power at the expense of a competing preference entity:

> While the stated goal of the banking arrangement is consonant with the preference clause, . . . the propriety of the goal cannot save the scheme if its interim effects are violative of the statute. That may be the case here. Congress intended public entities, whenever possible, to benefit from the sale of low cost federal power. An arrangement which enables a nonpreference entity to reap a benefit which Congress sought to bestow on public entities, even temporarily, flies in the face of that intent.

Id. at 671.

Since the amount of power produced at the Niagara project is limited, and only one-half was designated by Congress to be preference power, we should not construe the preference Congress created so broadly as to transfer the benefit to investor-owned utilities whom Congress explicitly excluded from the class that can benefit. Indeed, as the Supreme Court concluded in *Chemical Manufacturers Ass'n v. NRDC,* 105 S. Ct. 1102, 1108 (1985), when a construction of the statutory term in its broadest sense "makes little sense," that term has no plain meaning.

The precatory language of the NRA, 16 U.S.C. § 836(b)(1), speaks of the sale and distribution of preference power "for the benefit of" the people as consumers. MTA asserts that Opinion No. 229 substitutes "for resale to"

or "to" for the phrase "for the benefit of." Rehearing at 12. What MTA ignores is the fact that New York interests insisted that the NRA be consistent with existing New York law,[9] and the further fact that the New York Power Authority Act (now the Public Authorities Law) directs PASNY to sell power to municipalities that "engage in the distribution of electric power." MTA does not engage in the distribution of electric power to consumers at all. Opinion No. 229, slip op. at 15.[10] Although VDPS did arrange for distribution services, it did not "engage" in such services in the sense of being the party directly responsible for the needs of the consumers served. *Id.* at 14. Accordingly, we found that neither was entitled in its own right to purchase preference power under the NRA, *id.* at 14-15,[11] and held that the NRA term "public bodies" includes

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[9] *See, e.g.*, the 1956 opinion of former New York Attorney General Javits, Hearings at 48-54, and the statement of New York Attorney General Lefkowitz, Hearings at 345-47. The House and Senate debates on the compromise bill establish that the New York interests accepted that bill as being consistent with New York law. *See, e.g.*, 103 Cong. Rec. at 14 439, 14,442 (August 12, 1957).

[10] MTA contends that our definition of "public bodies" contravenes federal policies in favor of mass transportation and energy conservation. MTA Rehearing at 37. Opinion No. 229 interpreted the NRA in an adjudication to determine and fix the amount of Niagara preference power that PASNY should sell to "public bodies" and nonprofit cooperatives in the states neighboring New York. We found that PASNY improperly diverted to MTA some of the power Congress set aside to satisfy these needs. We continue to believe that the NRA dictates that MTA can make purchases only from the nonpreference half of the Niagara project's output. *See* Opinion No. 229, slip op. at 15.

[11] MTA also contends that we have ignored the environmental impact of our interpretation of the NRA to preclude MTA from purchasing preference power from the Niagara Project. MTA Rehearing at 35-36. However, in *Santa Clara*, the Ninth Circuit rejected a similar claim, noting that there can be no absolute quantitative adverse environmental effects when the amount of low cost hydropower is finite and demand for power exceeds the existing power supply. 572 F.2d at 680. Moreover, the National Environmental Policy Act of 1969, 42 U.S.C. § 4332,

only "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail." *Id.* at 14.[12]

VDPS' argument, Rehearing at 17-20, that the NRA explicitly permits it to purchase preference power on behalf of the State of Vermont distorts the provision for the establishment of bargaining agencies, and renders subsection 1(b)(2), 16 U.S.C. § 836(b)(2), internally inconsistent. The concept of a "bargaining agency" in the NRA is designed to promote efficiency, *see* Opinion No. 229, slip op. at 11, not to modify the carefully-crafted preference provisions of the Act. The reference in subsection 1(b)(2) of the NRA to the sale of power "to or in such States," and the reference in the preceding sentence to the procurement of power "on behalf of such State," were simply shorthand ways of referring to the "public bodies and nonprofit cooperatives" within the state.[13] Thus, rather than requiring

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addresses administrative actions, not complaint proceedings in which the Commission construes a statute. *See* FPC v. Corporation Comm'n of Oklahoma, 362 F. Supp. 522 (W.D. Okla. 1973), *aff'd*, 415 U.S. 961 (1974).

[12] Opinion No. 229 inadvertently stated that VDPS was not a "public body" because it does not own a distribution system. Slip op. at 14. Since an ownership requirement has not been Commission policy in the past, *see, e.g.*, Town of Massena v. Niagara Mohawk Power Corp., 13 FERC ¶ 63,036 (1980), *complaint withdrawn and decision vacated as moot*, 20 FERC ¶ 61,406 (1982), and we did not intend to create a new prerequisite in Opinion No. 229, we are hereby correcting Opinion No. 229 in this respect. In all other respects, however, we stand by the definition of "public body" set out in Opinion No. 229. On the present record, we cannot determine whether the Vermont legislature's recent actions, 30 V.S.A. § 212a, on April 23, 1985, will enable VDPS to qualify as a "public body" under the NRA. We leave it to PASNY in the first instance to determine the legality of such arrangements. We will exercise our responsibilities to resolve any disputes as they arise through the complaint process established by the NRA and the FPA.

[13] This is illustrated through statements of Congressman Blatnik of

each preference customer to bargain individually with PASNY, the NRA permits the state to designate a bargaining agency to act on behalf of the preference customers.[14]

Finally, it appears that Vermont once so understood this provision. Soon after passage of the NRA, VDPS' predecessor may have been concerned that it would not qualify to purchase preference power. The existing state law, 30 V.S.A. § 211, required it to resell power "without preference or discrimination," including resale to privately-owned utilities. Exhibit No. 255. The statute was supplemented to eliminate this requirement, 30 V.S.A. § 212, and to authorize VDPS' predecessor to purchase Niagara power and to offer it for "resale . . . in accordance with the terms of said federal legislation and federal license." Exhibit No. 38 at 4. Concern about compliance with the NRA apparently was also the reason why the initial application filed by VDPS' precedessor for Niagara preference power requested power only on behalf of the state's municipally and cooperatively-owned utilities. Exhibit Nos. 141 and 34. *See also* Tr. 3023-3024.

C. Ten Percent of the Niagara Power Should Be Sold to Preference Customers in Neighboring States.

1. Opinion No. 229 Properly Established A Reasonable Allocation of Preference Power To the Neighboring States on the Basis of the Facts in the Record.

PASNY also invokes the plain meaning of the NRA in support of its claim that Congress gave it authority to

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New York. He described the compromise bill, 103 Cong. Rec. at 13,195 (July 31, 1957), stating that fifty percent of the power "will go to rural electric cooperatives and the municipalities of the State of New York," and that "up to 20 percent of such preference power may be sold to preference customers outside the State of New York." But, *id.* at 13,197, he said, "The different States shall thus be given the power."

[14] The state may designate a governmental body or even one of the preference customers to act as the bargaining agency.

determine, in its discretion, how much power it should export to the neighboring states. PASNY Rehearing at 26-28. Moreover, PASNY claims that the Commission previously determined that "the Power authority's obligation to provide a reasonable portion of preference power, up to 10%, to out-of-state customers in fact vests 'maximum' discretion in the Power Authority." *Id.* at 27 (quoting *Municipal Electric Utilities Ass'n v. PASNY*, "Order Granting in Part And Denying in Part Motions for Summary Judgment, Providing for Expedited Hearing, and Consolidating Proceedings," 9 FERC ¶ 61,128 at p. 61,248 (1978)). However, the portion of that order which PASNY quotes discusses a portion of the Ives-Javits bill that was rejected by Congress. While Opinion No. 229 does not disagree with PASNY's contention that it has discretion in the first instance to fix the portion of the power to be exported, it rejects the notion that the Commission can abdicate all responsibility to review the reasonableness of PASNY's allocation decisions. Slip op. at 5.

PASNY also disputes Opinion No. 229's factual conclusion that PASNY acted arbitrarily and unreasonably when it sold "preference power to non-preference customers in New York State while refusing to provide out-of-state preference customers the maximum amount of power available to them under the NRA." *Id.* at 6. PASNY claims that "the very circumstances which the Commission relied on in awarding the full ten percent were present in more exaggerated form when Congress passed the NRA, in that even less preference power could be used by in-state preference customers in 1957 than is used today." PASNY Rehearing at 28. While PASNY is correct with respect to the needs of New York State preference customers, its factual analysis is incomplete because it ignores the radically different situation in the neighboring states. In this proceeding it became clear that preference customers in neighboring states need the full ten percent of the Niagara power that Congress set aside, and it is not disputed that

it is economic to export the full amount to them. Yet, at the time the NRA was enacted, there was uncertainty whether it would be economic to transport any of this power to the neighboring states.[15] It was the fact that the preference customers in the neighboring states needed the maximum amount available to them, while the New York State preference customers did not, which led us to modify PASNY's allocation for the neighboring states. Opinion No. 229, slip op. at 5-6. These circumstances differ significantly from the factual situation before Congress when it enacted the NRA.[16]

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[15] Subsequent facts demonstrate that this concern was justified. In October 1960, four months before the Niagara project was placed into operation, VDPS' predecessor applied for a reservation of 180 MW of firm power, then considered to be all of the neighboring states' preference power, and requested receipt of this power over time, based on the needs of the preference entities in Vermont. Exhibit Nos. 141 and 34. Although PASNY rejected the application, it sold 50 MW for use in Vermont on June 20, 1961. Exhibit No. 45. Five years later, on July 26, 1966, PASNY entered into a contract with Allegheny to sell an additional 100 MW of preference power for use in Pennsylvania, bringing the total sale to neighboring states to 150 MW, still less than ten percent of the project power.

[16] While we were unconvinced by Allegheny's contentions that the NRA requires an allocation of the full ten percent of the Niagara power to out-of-state preference entities, Opinion No. 229, slip op. at 5, we believe that Allegheny's legal analysis demonstrates that Congress was uncertain in 1957 whether Niagara power could be exportable economically to the neighboring states. *See* Allegheny Brief on Exceptions at 41-46.

In reflecting upon PASNY's disagreement with our factual analysis, we returned to Allegheny's legal analysis. We now believe that our decision to require PASNY to allocate to the neighboring states the maximum amount Congress set aside is correct on the basis of the law as well as the facts. The legislative history confirms that Congress intended the full ten percent of the project power to be exported to the neighboring states if economically feasible.

Despite Congress' desire to allocate twenty percent of the preference

2. Ten Percent of the Peaking Interchange Energy Should Be Made Available to Preference Customers

power to the neighboring states, the amount of preference power that may reasonably be exported from New York was expressed in Subsection 1(b)(2) as a maximum, rather than as a fixed percentage, because it could not be proved, before the Niagara project was built, whether the power could be transmitted to the neighboring states at a cost that would be lower than the cost of the inexpensive power that was then being generated locally from coal. As Senator Clark conceded, 103 Cong. Rec. at 14,441 (August 12, 1957), If we can produce power from coal and can sell it for a lesser price than the price for the power we can wheel from Niagara, then we are not within economic transmission distance and we are not entitled to one kilowatt of that power."

Senator Kerr, who authored the compromise bill, explained that New York agreed to give up twenty percent of the preference power—not "up to" twenty percent—because of the emergency that was adversely affecting New York. 103 Cong. Rec. at 14,451 (August 12, 1957). To like effect see Congressman Miller's statement, 103 Cong. Rec. at 13,204 (July 31, 1957); Congressman Blatnik's statement, 103 Cong. Rec. at 13,196 (July 31, 1957); S. Rep. No. 539, 85th Cong., 1st Sess. at 8 (1957). Indeed, in this respect the minority views of Senator Neuberger are in accord with the majority. While arguing that the twenty percent figure was too low an allotment for preference entities in states neighboring New York, Senator Neuberger discussed the NRA as containing an "80-20 division of power between New York and its neighbors." *Id.* at 11. To like effect see H. Rep. No. 862, *reprinted in* 1957 U.S. Code Cong. [Bluebook] & Ad. News 1585, 1593. Indeed, in FPC v. Tuscarora Indian Nation, 362 U.S. 99, 104 n.8 (1960) (quoting 16 U.S.C. § 836(b)(1)), the Supreme Court also noted that Congress resolved the dispute over how to allocate Niagara Project power by conditioning the license, *inter alia*, to require that "at least 50% of the project power must be made available to public bodies and nonprofit cooperatives, at the lowest rates reasonably possible,' and 20% of that amount must be made available for use in neighboring States."

Finally, during the debate on the compromise bill, Senator Carroll said with respect to Subsection (1)(b)(2), 103 Cong. Rec. at 14,450 (August 12, 1957), "We place a limitation upon the word 'reasonable' appearing in line 19, by the '20 percent' appearing in line 23." That statement is highly persuasive that the NRA compromise sought to define the word "reasonable" and, together with the other statements cited herein, convinces us that the compromise defined the term "reasonable portion" to mean the "economically exportable portion."

in Neighboring States.

In Opinion No. 229, we interpreted the Commission's 1976 *Vermont* decision, 55 F.P.C. at 1119, as holding that no classification of the Niagara project's power *and energy* should escape the NRA export requirement. Thus, Ordering Paragraph (F) requires PASNY to make ten percent of "every classification of Niagara power and energy sold" available in neighboring states. But, intending to be consistent with the Initial Decision in *Vermont*, 55 F.P.C. at 1147-48, the order was qualified, slip op. at 22, to give PASNY flexibility to meet firm energy obligations.

MMWEC's petition for rehearing calls our attention to certain testimony to support its claim:

> (1)that peaking interchange energy used for support purposes is indeed "sold" to New York customers and (2)that the benefits of the Niagara energy used for support purposes are retained within New York.

MMWEC Rehearing at 13.[17]

We are persuaded that the Niagara peaking interchange energy that is used to support firm energy obligations on PASNY's system should be included in the overall project energy that is shared with New York's neighboring states. Such energy clearly is sold for consumption within New York.[18]

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[17] PASNY witness Pellegrino testified at Tr. 1748 that PASNY's first priority for peaking interchange energy is to serve firm power customers of other PASNY generating facilities when those facilities are out of service. He also testified at Tr. 1735 that when PASNY does so, those customers pay the energy charges for Niagara energy (rather than for the other facilities' energy), plus any applicable transmission charges.

[18] As witness Pellegrino testified at Tr. 2005, eighty-seven percent of such energy was used for support purposes in 1981. The exclusion of energy used for support purposes could result in the denial of any

PASNY should not be denied the flexibility in appropriate circumstances[19] to use for support purposes in New York the share of peaking interchange energy that otherwise would be exported to neighboring states. On the other hand, PASNY should be prepared to make up to such states an equal amount of such energy at the earliest practicable time. Since peaking interchange energy has never been exported to states neighboring New York, we will leave to PASNY in the first instance the task of implementing these principles.

II. THE RELIEF ORDERED IN OPINION NO. 229 IS APPROPRIATE.

A. Opinion No. 229 Correctly Balanced the Equities In Ordering Prospective Relief.

Ironically, parties on both sides of the "public bodies" dispute claim that we erred by giving guidance for the future rather than limiting our remedy to the contract period that was the subject of the complaints which initiated this proceeding. CMEEC urges us to order immediate and retroactive relief. CMEEC Rehearing at 31-33. At the same time, VDPS contends that we lack statutory authority to rule in this proceeding on post-June 30, 1985 allocation questions. VDPS Rehearing at 48-49. (To like effect see Rockland Rehearing at 10-11.)

In our opinion, the NRA imposes no such limitation on our authority to fashion relief. Subsection 1(b)(2) of the NRA confers upon us the authority to resolve disagreements between PASNY and the "power-marketing agencies" of the neighboring states. It permits the Commission,

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peaking interchange energy for neighboring states if sufficient high-cost facilities are taken out of service. Consequently, CMEEC is wrong, Rehearing at 31-32, in saying that this energy could be used for remedial purposes without affecting present and future entitlements.

[19] "Appropriate circumstances" might include *bona fide* emergencies in New York and situations in which one or more of the neighboring states may be unable to receive the energy when it is available.

"after public hearings, [to] determine and fix the applicable portion of power to be made available and the terms appliable thereto." 16 U.S.C. § 836(b)(2). Since there is no limitation to the Commission's remedial authority, this authority should be read broadly to enable the Commission to enforce the conditions in PASNY's license. *See New York State Electric & Gas Crop. v. FERC,* 638 F.2d 388, 397 (2d Cir. 1980), *cert. denied,* 454 U.S. 821 (1981) (*NYSEG*). The Second Circuit in *PASNY* read the NRA to vest the Commission with such broad discretion in fashioning a remedy as to permit in an extreme case voiding in whole or part a contract made in violation of that Act." 743 F.2d at 112. If we have authority to void existing contracts that do not conform to our reading of the NRA, we must surely be authorized to provide the parties with guidance in advance so they can execute contracts that will comply with the dictates of the statute. Moreover, in *NYSEG* the Second Circuit held that the NRA did not divest the Commission of its usual FPA authority and responsibility "to assure that its licensee complies with other conditions of its license." 638 F.2d at 397. The FPA includes the authority to issue any order we find appropriate to carry out the purposes of the FPA. 16 U.S.C. § 825h. In this case, we issued a declaratory order interpreting the terms of the Niagara Project's license, which incorporates the NRA.

Although we found that PASNY's sales of preference power to VDPS and MTA violated the NRA and PASNY's license, we declined to grant retroactive relief in Opinion No. 229 because we concluded that "it would be unduly punitive to reduce the allocations of customers which were not at fault." Slip op. at 21. Concern about the equities of the relief ordered was mandated by the Second Circuit. *See PASNY,* 743 F.2d at 112. Moreover, the standard we applied here to determine whether to apply this decision retroactively was similar to the test that we used to determine whether to apply retroactively other decisions of

first impression not clearly foreshadowed by earlier cases. *See, e.g., Eagle Power Co.,* 28 FERC ¶ 61,061 (1984). *See also Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 88 (1982); *Lemon v. Kurtzman,* 411 U.S. 192 (1973); *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971).

Our decision not to interrupt existing contractual arrangements that were about to expire, however, does not require the perpetuation of illegal arrangements into new contract periods. VDPS has not been deprived of any beneficial interest. The very chapter from Priest, *Principles of Public Utility Regulation,* that VDPS cites in support of its claim that electric utilities have an obligation to continue service, VDPS Rehearing at 43 and n.39, states unequivocally, "The utility patron plainly has no vested right in the service provided." 1 Priest, *Principles of Public Utility Regulation* 244 (1969) (footnote omitted). Thus, VDPS is wrong when it claims a "beneficial interest" in the Niagara power. To the extent VDPS may have overpaid for the Niagara power it has already received, VDPS Rehearing at 5-6, its remedy must be obtained from PASNY directly, not from the other preference customers who never received any of these overpayments and may have already been deprived of preference power to which they were entitled.

VDPS had notice as long ago as 1977 that a reevaluation of PASNY's allocation of power to the neighboring states would take place in 1985. Exhibit 52 at Exhibit C, p. 10. Indeed, on January 10, 1980, in approving the contracts that will expire on June 30, 1985, Governor Hugh L. Carey of New York stated,

> Each of the present contracts will expire on June 30, 1985, the expiration date of the existing contract for the sale to Vermont of 100 megawatts of power from the Authority's St. Lawrence Project. This will permit the Authority to

> evaluate all requests for out-of-state allocations of Niagara and St. Lawrence hydropower at the same time on a common basis. It will also provide the beneficiaries of the contracts now before me with time to make alternate arrangements for the purchase of power in the event their allocations are reduced in order to help meet the energy needs of more of New York's neighbor states.

Exhibit 62, p. 1-2.

Finally, the abandonment concept upon which VDPS relies, Rehearing at 41, does not prevent us from resolving these questions of statutory construction in the manner we have chosen. Abandonment authority is a fundamental part of the Natural Gas Act (NGA), 15 U.S.C. § 717f(b), not the FPA or the NRA. Indeed, the very natural gas cases VDPS cites make clear the commission's authority to approve abandonment of service stems from the provisions of the NGA.[20] *See, e.g., Public Service Co. of North Carolina v. FERC,* 587 F.2d 716, 719 (5th Cir.), *cert. denied,* 444 U.S. 879 (1979). Where, as here, similar statutes have different provisions, each statute must be interpreted on its own. Just as the court in *Middle South Energy, Inc. v. FERC,* 747 F.2d 763, 768 (D.C. Cir. 1984), *petition for cert. filed sub. nom. City of New Orleans v. Middle South Energy, Inc.,* 53 U.S.L.W. 3778 (U.S. April 22, 1985) (No. 84-1668), concluded that it could not ignore the existence of the word "such" in section 205(e) of the FPA, 16 U.S.C. § 824d(e), and its absence in the parallel provision of the

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[20] We generally refuse to apply natural gas concepts to electric utility proceedings without a critical inquiry into the possible differences between the two schemes of regulation, *see, e.g.,* Delmarva Power & Light Co., 25 FERC ¶ 61,022 at 61,121 (1983), as the United States Court of Appeals for the District of Columbia Circuit recently noted with approval. Mississippi River Transmission Corp. v. FERC, No. 84-1046, slip op. at n. 15 (D.C. Cir. April 19, 1985).

Interstate Commerce Act, we should not ignore the presence of abandonment authority in the NGA and its absence in the FPA.

B. Opinion No. 229 Developed a Reasonable Allocation Methodology.

VDPS next contends that we failed to make a reasoned allocation decision in Opinion No. 229. VDPS Rehearing at 41. Others assert that we acted arbitrarily and inconsistently in allocating preference power on the basis of the precatory language while refusing to use that same language as the basis for fashioning entitlement criteria. Bethlehem Steel Rehearing at 5-6; Boston Edison Rehearing at 13-14; CMEEC Rehearing at 8-9. We disagree. Opinion No. 229 will channel low cost hydropower to the entities specified by Congress. Congress sought to use one-half of the low cost hydropower produced by the Niagara project to stimulate competition in an otherwise monopolistic market. Yet Congress imposed a limit on the amount of power that could be used for this purpose. However, we believe Congress gave us discretionary authority to allocate the Niagara power among the class of beneficiaries Congress established. Opinion No. 229 does so in a manner that will give effect to Congress' stated expectation that domestic and rural consumers should be the beneficiaries of this preference power.

CMEEC claims that the allocation methodology we chose is at variance with the practical background and legislative reference points brought home in the Second Circuit decision," CMEEC Rehearing at 23. Quoting *PASNY*, 743 F.2d at 105, CMEEC's Rehearing at 24 claims that the NRA was mainly concerned with ensuring that the needs of industry were met. However, the portion of the *PASNY* decision CMEEC cites relied upon Senator Chavez's statement pertaining to the emergency situation in the Niagara-Buffalo area—not all industry served by preference customers. This emergency was remedied through the sta-

tutory allocation of replacement power in Subsection 1(b)(3), 16 U.S.C. § 836(b)(3).

Our allocation of preference power according to the total number of domestic and rural consumers, rather than according to total loads, favors preference customers that resell preference power to domestic and rural consumers. We have exercised our discretion on the basis of Congress' expressed expectation of whom the ultimate beneficiaries ought to be. 16 U.S.C. § 836(b)(1).

PASNY contends that we erred when we narrowed the definition of the terms "domestic" and "rural" in *Vermont.* PASNY Rehearing at 21-23. While *Vermont* permitted resale of preference power to commercial and industrial consumers, 55 F.P.C. at 1116, so does Opinion No. 229. The Second Circuit has clearly established that the NRA does not bar such resale, *PASNY,* 743 F.2d at 104-05, as Opinion No. 229 acknowledges. Slip op. at 17. The allocation decision of Opinion No. 229, however, was not limited in any way by our analysis of the terms "domestic" and "rural" in *Vermont.* Since we found that there was insufficient preference power to serve all the needs of all the parties entitled to receive that power, in contradistinction to the situation in *PASNY,* 743 F.2d at 104, on the basis of our discretion we decided to allocate this power in a manner which would create an incentive for preference customers to resell this power to achieve Congress' stated expectation.

We thus wish to make clear that PASNY should only count the domestic and rural consumers served by preference entities that assert an interest in sharing in the preference allotment and are capable of receiving preference power. *See* PASNY Rehearing at 24.[21] Each of the

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[21] Although PASNY requests clarification of whether the allocation of preference power and energy based on numbers of domestic and rural consumers may be adjusted during an unspecified "transitional

domestic and rural consumers served by these preference entities should be counted, whether they are individually metered or not. Our inability to impose an end-use restriction prevents us from dictating that these preference customers must resell the preference power they receive to reduce the rates of their domestic and rural customers. Preference customers may resell the preference power as they wish, so long as they comply with the dictates of the NRA.

The Commission further finds:

The assignments of error and grounds for rehearing set forth in the requests for rehearing filed April 24, 25, and 26, 1985, present no facts or legal principles which warrant any change in or modification of the Opinion and Order issued in these dockets on March 27, 1985, except as that opinion and order is clarified herein.

The Commission orders:

(A)Public Service Electric and Gas Company, the New Jersey Board of Public Utilities, Rockland Electric Company, Atlantic City Electric Company, and the Rhode Ialand Attorney General and Public Utilities Commission are permitted to intervene herein pursuant to Rule 214, 18 C.F.R. § 385.214; *provided*, that their participation as intervenors shall be limited to matters affecting asserted rights and interests specifically set forth in their petitions to intervene; and, *provided further*, that their admission

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period" on the basis of showings of "severe economic dislocation or rate shock," Rehearing at 25-26, we find insufficient good cause to permit such a transition period. If ten percent of the project power and energy is allocated among the neighboring states, and if the preference customers within those states within economic transmission distance can use the power and energy, as to which we have no doubt, no additional preference power and energy can be made available for one state without having an adverse impact on the amount available for the other states. The potential gainers, Massachusetts and Connecticut, have waited long enough, and a large potential loser, Vermont, has enacted a statute that may minimize its potential losses.

as intervenors shall not be construed as recognition by the Commission that they might be aggrieved by any order entered in this proceeding, and, *provided further*, as set forth in rule 214 (d)(3)(ii), that they accept the record of this proceeding as it was developed prior to the late interventions.

(B)The Rhode Island Attorney General's and Public Utilities Commission's motion to join in some of the timely petitions for rehearing is denied.

(C)The request for oral argument made by the Vermont Department of Public service is denied.

By the Commission.

Secretary

Docket Nos. EL80-19-000
and -004, *et al.*

(Issued July 30, 1985)

STALON, COMMISSIONER, *dissenting:*

I am not in disagreement with the general thrust of the Commission's Order (Opinion No. 229-A) on rehearing which is to clarify its original Order (Opinion No. 229) in several respects and to respond to specific criticisms of Opinion No. 229 made in the petitions for rehearings. Specifically, I support the majority's opinion on rehearing that Opinion No. 229 correctly defined "neighboring states" and correctly balanced the equities in ordering prospective relief. I also agree with the majority in Opinions 229 and 229-A that the full 10 percent of Niagara preference power, including peaking interchange energy, allocable to "neighboring states" should be so allocated.

However, I wish to continue my dissent in Opinion No. 229 on two major issues, the definition of "public bodies" in the Niagara Redevelopment Act (NRA) and the methodology used for allocation of the 10 percent among the competing "neighboring states," and, in so doing, to clarify exactly what I would propose with respect to these two issues in contrast to what is decided in Opinion Nos. 229 and 229-A.

1. Definition of "Public Bodies" Under the Niagara Redevelopment Act.

Opinion No. 229 defines "public bodies" narrowly to include only "publicly-owned entities that are capable of selling and distributing power *directly to consumers of electricity at retail*". (emphasis provided). As I argued in my dissent to Opinion No. 229, I do not believe that interpretation is compelled by the NRA or its legislative history. Indeed, a plain dictionary meaning of "public body" is *any* government body. I do not, however, propose a definition that broad. I believe that the statute permits,

and sound regulatory policy favors, a definition that would encompass any government body that is organized by the state to receive and distribute within that state, in accordance with the terms of the NRA, Niagara preference power allocated to that state. Accordingly, I would eliminate the limitation that the body must engage directly in retail sales to end-use customers. As more fully argued in my dissent to Opinion No. 229, my proposal would eliminate a significant problem with Opinion No. 229, *viz.* that it encourages the construction of uneconomic transmission.

In imposing the direct retail sales limitation, Opinion Nos. 229 and 229-A create an artificial dichotomy, that is not compelled by the statute between "public bodies" and the concept of "bargaining agency." The latter concept in the NRA, Opinion No. 229-A concedes, is designed to promote efficiency. If a state believes it is more efficient, or otherwise desirable, to combine the two concepts into a single entity in order to receive and distribute Niagara preference power in accordance with the NRA, as the State of Vermont has done in creating the VDPS, I believe it should be permitted to do so. Accordingly, I dissented in Opinion No. 229 insofar as it declared VDPS not a "public body." I agreed, however, that the MTA, which does not have the authority of the State of New York to distribute power at all, is not encompassed in that definition.

The reason for imposing the retail sales limitation in Opinion Nos. 229 and 229-A appears to be a desire to ensure that the "federal-type preference" is enforced and that investor-owned utilities are not the intended beneficiaries of NRA preference power. The Commission's previous efforts to enforce an "end-use preference" in a state's distribution of NRA power proved to be misplaced in light of the decision in *PASNY v. FERC,* 743 F.2d 93 (2nd Cir. 1984), that Congress had not intended to create such a preference but rather a "federal-type" preference.

In my view, we should not repeat the mistake of attempting to police a preference, any preference, through a state's power distribution mechanisms but, rather, we should permit appropriate state-appointed distribution entities, such as VDPS, to distribute Niagara power in accordance with the NRA. Moreover, given that there is now no end-use preference to be enforced, an effort to ensure that Niagara preference power be directed only to retail public entities, such as municipal or rural cooperative utilities, and that it not benefit the IOUs or their consumers, will be futile because there is no constraint upon how the municipals or cooperative could dispose of the power once they received it. Moreover, the NRA itself states that the beneficiaries of Niagara preference power are to be "domestic and rural consumers," a definition so vague and unrelated to any existing theory of preference as to cause skepticism as to whether Congress had a clear preference scheme in mind in the NRA. I do not find compelling the assertion in Opinion No. 229-A that the NRA contains "carefully-crafted preference provisions" (which, as the *PASNY* case demonstrates, the Commission has already misinterpreted on one occasion).

As more fully argued in my dissent to Opinion No. 229, I do not agree that the goal of providing "yardstick competition" (if that is a meaningful concept in this context at all) justifies the narrow definition of "public body."

2. Methodology for Allocation of Preference Power to "Neighboring States."

The allocation methodology adopted in Opinion 229 would require PASNY to count the number of "rural" and "domestic" customers actually served by each preference entity that assert an interest in receiving Niagara preference power in each state before making the allocation amongst such states of the 10 percent of preference power to be alloted to them. That will require going behind the meters on each municipal or cooperative system in each state and

counting the number of customers actually served. I doubt that even the states or utilities themselves have that information available at all, let alone in a form that would permit PASNY, an out-of-state decision-maker, to make the calculation without excessive burden, and to check its accuracy with any assurance. Hence, we are once again imposing unnecessary transaction costs that will serve to reduce the rents to be derived from the allocation of preference power. Moreover, in adopting this methodology, we are in effect imposing an end-use test for allocation that the Circuit Court of Appeals has told us we may not impose in determining which public bodies qualify for receipt of that power.

In the light of these problems, I reiterate the proposal I made in Opinion No. 229, that the allocation be made on the basis of each state's population, as to which some of the most reliable, readily accessible and verifiable data bases are available. That test is far simpler and is equitable. It is, then, preferable on policy grounds and at least as sound legally as the allocation methodology adopted in Opinion No. 229. I agree with Opinion No. 229-A that the Commission has a broad discretion to make "a reasoned allocation decision." Under this test, my proposal is fully consistent with the NRA.

The merits of my approach were more fully argued in my dissent to Opinion No. 229, and I will not repeat those arguments here.

/s/ CHARLES G. STALON
Charles G. Stalon
Commissioner

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

OPINION NO. 229

Docket Nos. EL80-19-000 and -004

MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY

v.

POWER AUTHORITY OF THE STATE OF NEW YORK

Docket Nos. EL80-24-000 and -002

CONNECTICUT MUNICIPAL ELECTRIC ENERGY COOPERATIVE

v.

POWER AUTHORITY OF THE STATE OF NEW YORK

Docket No. EL78-24-029[1]

MUNICIPAL ELECTRIC UTILITIES ASSOCIATION OF NEW YORK STATE

v.

POWER AUTHORITY OF THE STATE OF NEW YORK

DECLARATORY OPINION AND ORDER AFFIRMING

WITH MODIFICATIONS INITIAL DECISION ON NIAGARA PREFERENCE POWER FOR STATES NEIGHBORING NEW YORK

Issued: March 27, 1985

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. EL80-19-000 and -004

MASSACHUSETTS MUNICIPAL WHOLESALE
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Docket No. EL78-24-029[1]

MUNICIPAL ELECTRIC UTILITIES
ASSOCIATION OF NEW YORK STATE
v.
POWER AUTHORITY OF THE STATE OF NEW YORK

OPINION NO. 229

APPEARANCES

David R. Straus, Scott Strauss, Thomas C. Trauger and *Maurice J. Ferriter* for Massachusetts Municipal Wholesale Electric Company

James F. Fairman, Jr., Grace Powers Monaco, Barry R. Lenk, Laurie Levin and *Robert Sussler* for Connecticut Municipal Electric Energy Cooperative

Vincent J. Tobin, Wendy M. Lane, Karen A. Kimmel, Gerald C. Goldstein, Barry Fischer and *Thomas R. Frey* for Power Authority of the State of New York

Renee Schwartz, Laurens Schwartz and *Paul Chessin* for Metropolitan Transportation Authority

Edward R. Muller, Lowell D. Turnbull and *Edward Berlin* for New York State Electric & Gas Company

J. Cathy Lichtenberg, Mark S. Laufman, John Wyeth Griggs and *Wallace L. Duncan* for Municipal Electric Utilities Association of New York State

William C. Wise, Robert Weinberg and *William E. Mowatt* for Allegheny Electric Cooperative, Inc.

Reuben Goldberg, Channing D. Strother, Jr., June W. Wiener, Craig A. Glazer and *Thomas E. Wagner* for City of Cleveland, Ohio and American Municipal Power - Ohio

William I. Harkaway, G. Douglas Essy and *Gerald R. Tarrant* for The Vermont Department of Public Service and Vermont Public Service Board

Douglas A. Eldridge for New York State Energy Office

Donald F. McCarthy for Consolidated Edison Company of New York, Inc.

Woodrow D. Wollesen for Borough of Lansdale, Pennsylvania

Carmen Gentile and *Jay Hickey* for Boston Edison Company, Cambridge Electric Company, Commonwealth Electric Company, Eastern Edison Company, Fitchberg Gas and Electric Company, Massachusetts Electric Company and Western Massachusetts Electric Company

Richard Miles and *Paul Hartley* for the Staff of the Federal Energy Regulatory Commission

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Raymond J. O'Connor, Chairman; Georgiana Sheldon, A. G. Sousa, Oliver G. Richard III and Charles G. Stalon.

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v.

POWER AUTHORITY OF THE STATE OF NEW YORK

Docket No. EL78-24-029[1]

MUNICIPAL ELECTRIC UTILITIES ASSOCIATION OF NEW YORK STATE

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[1] Pertaining to the issue severed by Opinion No. 151-A issued April 6, 1983, 23 FERC ¶ 61,031, for consideration in Docket Nos. EL80-19-000 and EL80-24.

v.

POWER AUTHORITY OF THE STATE OF NEW YORK

OPINION NO. 229

DECLARATORY OPINION AND ORDER AFFIRMING WITH MODIFICATIONS INITIAL DECISION ON NIAGARA PREFERENCE POWER FOR STATES NEIGHBORING NEW YORK

(Issued March 27, 1985)

I. Introduction

In 1980, the Massachusetts Municipal Wholesale Electric Company (MMWEC) and the Connecticut Municipal Electric Energy Cooperative (CMEEC) asked us to find that they are entitled to receive power from the Niagara Project, and to fix the applicable portion of power available to them pursuant to Section 1(b)(2) of the Niagara Redevelopment Act (NRA), 16 U.S.C. § 836(b)(2).[2] The Power

[2] On September 10, 1980, we consolidated the two proceedings and allowed the intervention of Allegheny Electric Cooperative, Inc. (Allegheny), the City of Cleveland, Ohio (Cleveland), Consolidated Edison Company of New York, Inc. (Con Ed), the Borough of Lansdale, Pennsylvania (Lansdale), the Municipal Electric Utilities Association of the State of New York (MEUA), the New York State Electric & Gas Corporation (NYSEG), the New York State Energy Office and the Public Service Board of the State of Vermont (PSB). During the course of the consolidated proceeding, the presiding judge also allowed the late intervention of American Municipal Power-Ohio, Inc. (AMP-Ohio), the Metropolitan Transportation Authority (MTA), the Rochester Gas and Electric Corporation (RGE), and the following investor-owned utility companies in Massachusetts: Boston Edison Company, Cambridge Electric Light Company, Commonwealth Electric Company, Eastern Edison Company, Fitchburg Gas & Electric Company, Massachusetts Electric Company and Western Massachusetts Electric Company (collectively, the Massachusetts Group).

Authority of the State of New York (PASNY) opposed these complaints contending that it had made a "reasonable" allocation of power for "neighboring States."

The hearing in this case explored how much project power PASNY should sell to neighboring state preference customers, which of the participants in this proceeding are entitled to purchase the power Congress set aside for the needs of neighboring state preference customers, and how such power should be allocated to each of those preference customers.

Before the presiding judge issued his Initial Decision, we issued Opinion No. 151 which determined that PASNY had not complied with the NRA in allocating Niagara Project power to meet the reasonably foreseeable needs of New York State preference customers. After an additional round of briefs addressing the impact of that Opinion on the issues presented in this case, on March 9, 1983, before Opinion No. 151 was modified on rehearing by Opinion No. 151-A, the judge issued an Initial Decision in this case. 22 FERC ¶ 63,087 (1983).

The Initial Decision, slip op. at 12-22, identified eight threshold findings as having been previously decided by the Commission:

1. Connecticut, Massachusetts, Ohio, Pennsylvania and Vermont are "neighboring States" within reasonable economic transmission distance of the Niagara project;

2. the NRA does not require PASNY at all times to allocate a full ten percent of project power to out-of-state preference customers;

3. every classification of Niagara project power is subject to the preference provisions of the NRA;

4. the Commission has authority to abrogate existing contracts in fulfillment of its duties under the NRA;

5. the Commission need not defer to PASNY's decision apportioning preference power between New York and its neighboring states but is authorized by the NRA to conduct a *de novo* review of PASNY's out-of-state allocation;

6. MMWEC, as the agent for the designated bargaining agent of Massachusetts, has "standing" to seek an allocation of Niagara preference power;

7. the Vermont Department of Public Service (VDPS) is entitled to an allocation of Niagara preference power; and

8. MTA is not entitled to an allocation of Niagara preference power.

The presiding judge then determined on the basis of record evidence that PASNY should make available to preference customers in neighboring states 10 percent of the project's power, the maximum amount Congress allowed. Initial Decision at 23. While he recognized that the Commission has broad discretion in selecting an apportionment methodology, *id.* at 24, he selected the method which he found to be most consistent with Congressional intent. *Id.* at 29. After adjusting the staff's figures, *id.* at 31, the presiding judge derived tentative percentage entitlement factors for each applicant. *Id.* at 34. Applying the tentative entitlement factors, he fixed tentative firm and peaking power allocations for each applicant. *Id.* at 35. Finally, the Initial Decision adjusted these tentative allocations to reflect situations in which the preference power could not be transmitted to, or otherwise enjoyed by, the consumers for whom it was intended.[3] However,

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[3] In the case of MMWEC and CMEEC, the judge found that there was a west-to-east transmission "bottleneck" in New York that resulted in physical transmission limitations during peak periods and, consequently, precluded firm transmission service for firm preference power. Although MMWEC AND CMEEC expressed their willingness to accept

the judge gave notice that these allocations could be adjusted if these preference entities could perfect their abilities to receive power. *Id.* at 40.

Substantially all of the parties, and a group of new parties that have requested leave to intervene out-of-time,[4] have requested review of the Initial Decision. In reviewing this decision, we will pay careful heed to the instructive opinion of the Second Circuit, which affirmed our determination concerning PASNY's allocation of Niagara Project power in New York State, and only modified our decision with respect to part of the relief ordered. *Power Authority of the State of New York v. FERC,* 743 F.2d 93 (2d Cir. 1984) (*PASNY*).

II. Ten Percent of the Niagara Project Power Should Be Sold to Out-of-State Preference Customers.

Section 1(b)(2) of the NRA, 16 U.S.C. § 836(b)(2), requires PASNY to make a "reasonable" portion of the preference power available for use in states neighboring New York,

> but this paragraph shall not be construed to require more than 20 per centum of the project power subject to such preference provisions to be made available for use in such States.

We have previously interpreted this caveat to mean that 20 percent is the maximum percentage of preference power that may be exported from New York, but that Congress

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firm power on a non-firm transmission basis (*i.e.*, the energy associated with the firm capacity), the Initial Decision declined to make such an allocation and limited MMWEC's and CMEEC's allocations to "non-firm" Niagara energy. Initial Decision at 37-38. Lansdale, which was unable to arrange transmission service for about 1-1/2 miles, was denied any allocation. *Id.* at 36.

[4] Bethlehem Steel Corporation, General Motors Corporation, Occidental Chemical Corporation-HOOKER Industrial & Specialty Chemicals, Olin Corporation and Union Carbide Corporation (collectively, the New York Industrials).

did not require PASNY to sell the maximum amount, only a "reasonable" amount. *State of Vermont Public Service Board v. Power Authority of the State of New York,* 55 F.P.C. 1109, 1120 (1976). We took the same position in the orders issued in this case on February 13, 1981, and March 4, 1982, stating in the latter order (emphasis added):

> [W]e reaffirm our holding that out-of-state entities are not always entitled, *as a matter of law,* to allocations aggregating a full ten percent of project power. The *factual issue* of whether a full ten percent allocation to out-of-state entities or a lesser amount is a "reasonable portion" of project power should be examined in the hearing.

18 FERC ¶ 61,217 (1982). We remain unconvinced by Allegheny's contentions (Exceptions at 40-46) that the NRA, as a matter of law, requires an allocation of the full 10 percent to out-of-state preference entitles.

PASNY asserts, however, that "[t]he plain meaning of the NRA, its legislative history, and prior FERC rulings clearly establish that the amount of Niagara Project power to be allocated out of state is a reasonable amount, as determined by the Power Authority, *up to* 10%." (Exceptions at 14). For the reasons stated by the presiding judge, Initial Decision at 14-16, we disagree with PASNY's assertion that we must defer to its determination of what is a reasonable amount. In *PASNY,* PASNY made this same claim that it is entitled to more deference than other licensees. *PASNY,* 743 F.2d at 108. While the court found it unnecessary to resolve this dispute there because it found that PASNY had acted arbitrarily and unreasonably, in *dicta,* the court stated that it is "doubtful" that PASNY is entitled to more deference than other licensees, noting that municipalities and state agencies are among the general class of Commission licensees. *Id.* Quoting *Scenic Hudson Preservation Conference v. FPC,* 354 F.2d 608, 620 (2nd Cir. 1965), *cert. denied,* 384 U.S. 941 (1966), the court

noted that the Commission must play an active role in protecting the public interest. *Id.* We believe this obligation can only be met if we independently examine the facts surrounding PASNY's allocation of preference power to preference entitles in neighboring states.

The facts of this case convince us that PASNY has not made a reasonable amount of preference power available for preference customers in neighboring states, and has acted arbitrarily and unreasonably in allocating less than 10 percent of the Niagara Project power to out-of-state preference purchasers. PASNY's own projections demonstrate that New York State preference customers would not need 40 percent of the project power until the winter of 1986/1987. Initial Decision at 23, citing Exh. 85, pp. 3-6; Exhs. 86, 87.[5] Under the present circumstances we find

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[5] PASNY now disputes the presiding judge's factual finding that it is providing New York State preference customers less than 40 percent of the project's power, and claims that it did not protest the introduction of the evidence the judge relied upon because it considered that evidence to be irrelevant to this proceeding. (Exceptions at 15 and n. *). However, in our order of February 13, 1981, 14 FERC ¶ 61,128 (1981), we directed the judge to consider in his determination of what constitutes a reasonable allocation for out-of-state preference customers MEUA's claim that the needs of New York State preference customers must be satisfied before there can be any allocation to out-of-state preference customers. We stated that the reasonably foreseeable needs of both classes of preference customers were "inextricably tied." PASNY therefore had adequate notice that we would compare the needs of New York State and out-of-state preference customers in this proceeding. PASNY cannot now, for the first time, protest the judge's use of evidence pertaining to this question.

Moreover, we have no reason to doubt the reliability of this evidence. In *PASNY* the Second Circuit agreed with the Commission that PASNY was supplying New York State preference customers substantially all of their reasonably foreseeable needs (547.2 MW), and would be able to continue to do so until June 30, 1985. 743 F.2d at 112. PASNY also asserted that it would be able to satisfy all the needs of MEUA members between 1985 and 1990 by supplying them up to 697.53 MW of power. *Id.* The court modified the remedy we ordered in Opinion

that PASNY will be acting arbitrarily and unreasonably if it sells preference power to non-preference customers in New York State while refusing to provide out-of-state preference customers the maximum amount of power available to them under the NRA. As the presiding judge correctly concluded, *id.* at 23, the congressional intent to allocate 50 percent of the project power to preference customers was defeated by PASNY's allocation decisions.

We further find that the judge was correct in comparing the needs of New York State and out-of-state preference entities. While the NRA explicitly limits out-of-state preference customers to no more than 10 percent of the Niagara Project power, it did not authorize PASNY to discriminate against them. Yet it is clear that PASNY did in fact discriminate against out-of-state preference customers in other ways. Despite the Commission's instruction in *Vermont* that PASNY should allocate all types of power and energy to satisfy the needs of out-of-state preference customers, 55 F.P.C. at 1121, there is no evidence that PASNY gave any consideration to allocating more than 180 MW of firm and peaking power to serve the needs of out-of-state preference customers. Nor is there any evidence that PASNY first compared the needs of New York State customers with the needs of out-of-state preference entities before allocating more preference power to New York State customers. By selling preference power to non-preference entities in New York State while denying preference entities in neighboring states the maximum Congress set aside, PASNY acted unreasonably and in violation of the NRA.

No. 151[1] in order to permit PASNY to attempt to satisfy preference customers' needs without abrogating PASNY's contracts by substituting power from the St. Lawrence project. *Id.* at 112-13. Since 40 percent of the Niagara Project's firm power, as determined in *Vermont*, is 752 MW, the presiding judge correctly concluded here that PASNY is not using 40 percent of the Niagara Project's power to serve the needs of New York State preference customers.

When the NRA set 20 percent as the maximum amount of preference power to be made available for out-of-state customers, it linked this allocation to the general provision which set aside half of the project power for the needs of public bodies and nonprofit cooperatives. Section 1(b)(2) of the NRA, 16 U.S.C. § 836(b)(2), concludes by directing that "[t]he arrangements made by the licensee for the sale of power to or in such States shall include observance of the preferences in paragraph (1) of this subsection." Those preferences concern the allocation of project power between "public bodies and nonprofit cooperatives within economic transmission distance," on the one hand, and "utility companies organized and administered for profit," on the other hand. PASNY cannot make a "reasonable" allocation for out-of-state preference customers according to a different standard than the one it uses to determine the "reasonably foreseeable needs" of New York State preference customers. Nor can PASNY make preference power available to non-preference customers while denying that power to preference customers. PASNY must operate under the same marketing plan within and outside New York.

III. The Entitlement Issues

The NRA directs PASNY to "give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance" in disposing of 50 percent of the Niagara Project's power. 16 U.S.C. § 836(b)(1). Although the statute "expresses a Congressional expectation," *PASNY*, 743 F.2d at 104, that preference power "shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers," 16 U.S.C. § 836(b)(1), the Second Circuit declared that this expectation was "not a mandate." 743 F.2d at 104. Rather, the court found Congress rejected an end-use preference and adopted instead a federal-type preference which allows preference customers the "right to decide on the ultimate retail distri-

bution of the preference power sold to them." *Id.* at 105. The court read the legislative history to be premised upon the principle of yardstick competition which assumes "that if the municipal entities (as distinguished from the end-users) are supplied with cheap hydropower their lower competitive rates will force the private utilities in turn to reduce their rates, with resulting benefits to all, including rural and domestic consumers." *Id.*

As discussed above, a maximum of 10 percent of Niagara Project power is set aside for preference entities in neighboring states. In making this preference power available, the statute directs PASNY to negotiate with "the appropriate agencies in such States." 16 U.S.C. § 836(b)(2). However, "[i]n the event of disagreement between the licensee and the power-marketing agencies of any of such States, the Federal Energy Regulatory Commission may, after public hearings, determine and fix the applicable portion of power to be made available and the terms applicable thereto." *Id.* The statute further requires PASNY to deal only with a state "bargaining agency" when the State designates "a bargaining agency for the procurement of such power on behalf of such State." *Id.* Finally, the subsection concludes that "[t]he arrangements made by the licensee for the sale of power to or in such States shall include observance of the preferences in paragraph (1) of this subsection." *Id.*

In this section we will interpret the words Congress used in the NRA in order to determine which of the parties to this proceeding are entitled to purchase Niagara Project preference power. Since the NRA does not distinguish between "public bodies" in New York and in "neighboring States," we will construe the statute's entitlement criteria in a manner that is consistent with the Second Circuit's decision in *PASNY*.

A. "Neighboring States"

At the outset, we reject Allegheny's asserted limitation on the term "neighboring States," and reaffirm our con-

struction on this term in *Vermont*. Contrary to Allegheny's assertion (Exceptions at 8-39), Congress did not specifically designate Ohio and Pennsylvania as the sole out-of-state recipients of preference power, as it might have done.[6] Without specific proof that the use of the literal meaning of "neighboring States" would lead to "absurd results" or would otherwise "thwart the obvious purpose of the statute," we must conclude that Congress meant what it said. *See Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978), quoting *Commissioner v. Brown*, 380 U.S. 563, 571 (1965).

Connecticut, Massachusetts and Vermont are neighboring states to New York because they border New York on the east. The legislative history makes clear that Congress considered Ohio to be a neighboring state. We find that the purposes of the NRA will be served by construing the term "neighboring States" in a manner that is consistent with its usual meaning. The NRA was developed as a compromise between two competing views, one which saw Niagara hydropower as a regional resource, and one which considered it a New York State resource. H. R. Rep. No. 862, 85th Cong., 1st Sess. (1957), *reprinted in* 1957 U.S. Code Cong. & Ad. News 1585, 1593. The compromise limited out-of-state preference customers to 10 percent of the project's power. *Id.* By interpreting "neighboring States" according to its usual meaning, we give full effect to Congress' desire to share the benefits of the Niagara project among preference customers throughout the region, but on a limited basis.

If Congress had intended to benefit only Ohio and Pennsylvania, it would not have stated that it expected the power to be made available "in such manner as to encourage the widest possible use." 16 U.S.C. § 836(b)(1).

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[6] In contrast, Section 5(c) of the Boulder Canyon Project Act, 43 U.S.C. § 617d(c), specifies a preference for the states of Arizona, California and Nevada.

Rather, the numerous references to Ohio and Pennsylvania in the legislative history simply demonstrate that Congress had particular interest in these states, not that Congress intended to grant them an exclusive benefit. Public bodies and nonprofit cooperatives in Ohio and Pennsylvania were probably considered the ones most likely to benefit from the out-of-state allocations because of their proximity to Niagara Falls.

Moreover, the legislative history does not clearly demonstrate that a more limited reading of the statute is necessary. There are indications in the legislative history that Congress intended to benefit states other than Ohio and Pennsylvania. For example, Senator Chavez of New Mexico, who was Chairman of the Committee on Public Works (a subcommittee of which conducted the 1957 hearings), stated in the course of his remarks opening the debate on the compromise bill:

> The New York and New England area has the highest power rate of any section of the country. It is hoped that the Niagara project will provide a source of cheap, dependable power that will provide an adequate yardstick and permit lower power rates and greater use of electricity over a large part of the northeastern section of our country. .

103 Cong. Rec. 14,438 (1957).

Congressman Miller of New York represented the congressional district within which the Niagara project would be constructed and, therefore, participated actively in the legislative proceedings. He said during the course of the debate on the compromise bill:

> It is provided that 50 percent of the power will not be subject to any federal preference. . . . The other 50 percent will be subject to the preference clause, and 10 percent of that, or 20 percent of

> the whole, will be available to New York or the neighboring States. Any neighboring State, *such as Massachusetts,* if it makes application before the Federal Power Commission, will receive its reasonable share of this power if it can prove that the power can be transmitted to such State and be sold there under economic conditions and that they can utilize the power, and that it is cheaper there than power which they themselves can generate by steam power. Then they would be entitled to a portion of this power.

103 Cong. Rec. 13,204 (1957). (Emphasis added).

Lastly, Senator Ives of New York, who co-sponsored the Javits bill, spoke during the debate on the compromise bill of "fairness to other States involved, *particularly* Ohio and Pennsylvania". 103 Cong. Rec. 14,439 (1957). (Emphasis added). If Senator Ives understood the compromise bill to limit the meaning of the term "neighboring States" to Ohio and Pennsylvania, as Allegheny contends, he would not have used the word "particularly."

Taking all these factors together, we conclude that "neighboring States" should be construed according to its usual meaning.

B. "Public Bodies"

The NRA requires PASNY to deal only with a state "bargaining agency," whenever a state has designated a bargaining agency to procure preference power for the "public bodies and nonprofit cooperatives" in that state. 16 U.S.C. § 836(b)(2). During the 1957 Hearings before a Subcommittee of the Committee on Public Works, Senator Carroll explained to a witness from the National Rural Electric Cooperative Association that he believed the states should negotiate with PASNY through accredited agencies on behalf of preference customers. Hearings at 339. Section 1(b)(2), 16 U.S.C. § 836(b)(2), refers to such state

agencies alternatively as "appropriate agencies in such States," "power-marketing agencies of any of such States," and "bargaining" agencies. We find that these three phrases are synonyms which use the term "agency" to refer to an entity that performs a function on behalf of another; in this case, the procurement of such power on behalf of preference customers in that state.

It is not disputed that VDPS is the bargaining agency of the State of Vermont. The State of Massachusetts authorized its Department of Public Utilities (DPU) to be its bargaining agency, which then authorized MMWEC to be its agent to procure Niagara Project power from PASNY. (Exh. 198).[7] However, we find that Congress did not use the term "bargaining agency" in Section 1(b)(2) as a synonym for the critical term in Section 1(b)(1), "public bodies."

Congress required PASNY to observe the statutory preferences for "public bodies and nonprofit cooperatives" in making arrangements for the sale of preference power "to or in such States." 16 U.S.C. § 836(b)(2). Bargaining agencies are not entitled to purchase preference power in their own right. They may only act as agents for principals who are entitled to purchase preference power. On the other hand, the NRA imposes no end-use restrictions upon resale of that power by public bodies and nonprofit cooperatives. *PASNY* 743 F.2d at 104. The NRA limits whom PASNY may sell preference power, not how the power should ultimately be used.

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[7] We reject the allegations that MMWEC lacks standing in this case, because there has been no clear proof that DPU lacked authority to designate MMWEC as its agent. In the absence of clear evidence to the contrary, we will assume that this Department of the State of Massachusetts properly discharged its official duties. *See* Moore v. Ross, 502 F. Supp. 543, 554 (S.D.N.Y. 1980), *aff'd*, 687 F.2d 604 (2d Cir. 1982), *cert. denied*, 459 U.S. 1115 (1983).

Before we can allocate Niagara preference power, we must decide which of the applicants are "public bodies." (There is no dispute what the term nonprofit cooperative means.) Relying heavily upon our decision in *Vermont,* the presiding judge concluded that VDPS is a "public body." Initial Decision at 17-18. While the judge found no changed circumstances since our decision in *Vermont, id.,* we find that the court's decision in *PASNY* requires a reevaluation of this determination.

Contrary to Vermont's assertion, *stare decisis* does not bar this reevaluation. (*See* Opposition at 26-33). Nor are we precluded from reconsidering our prior decision because of collateral estoppel, as the Massachusetts Group asserts. (*See* Opposition at 23-26). First of all, "[t]here is, of course, no rule of administrative *stare decisis.* Agencies frequently adopt one interpretation of a statute and then, years later, adopt a different view. [The Supreme] Court and other courts have approved such administrative 'changes in course,' as long as the new interpretation is consistent with congressional intent." *Bankamerica Corp. v. United States,* ___ U.S. ___, 103 S. Ct. 2266, 2281 (1983) (White J., dissenting). (Footnote omitted).

The *Vermont* decision was case-specific,concerning an allocation of 30 megawatts of power to Allegheny in 1974. While we approved the allocation to Allegheny, we ruled that PASNY must make a reasonable portion of preference power available out-of-state. In this case we are determining whether that has occurred. In *Vermont,* further, Allegheny admitted that PSB was a "public body,"[8] 55 F.P.C. at 1113, but argued that the "PSB's status as a public body serves merely to thwart the will of Congress." 55 F.P.C. at 1116. We disagreed because we found that the PSB was ensuring that the power would benefit domestic and rural customers in Vermont. *Id.* Now, *PASNY*

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[8] The presiding judge noted that "Allegheny concedes that PSB is a public body of the State of Vermont." 55 F.P.C. at 1129.

has instructed us not to scrutinize end-use. Since the explicit rationale in *Vermont* was based on an erroneous construction of the NRA, it must not bind the future negotiations among these parties. In deciding these difficult legal questions, we must not allow preclusion notions to interfere with our obedience to a recent related precedent. These doctrines must not be applied woodenly and rigidly to defeat congressional intent. Finally, in *Vermont,* we specifically left for a future case one allocation issues presented here. 55 F.P.C. at 1120.

The critical error in the Initial Decision in this case, and in the *Vermont* decision upon which the judge relied, is the assumption that the NRA contains an end-use preference. In defining VDPS as a "public body," the judge put great weight upon the fact that VDPS was using this preference power to benefit domestic and rural consumers. Initial Decision at 21. Yet the Second Circuit has now ruled that the NRA contains no end-use preference. At the same time, the presiding judge recognized that defining VDPS as a "public body" under the NRA would subvert the goal of yardstick competition because VDPS would resell that power to both publicly-owned and privately-owned utilities. *Id.* at 20. Yet that was the very goal the court found lay beneath the preference for "public bodies." Under these circumstances, we cannot defer to either decision, but must reevaluate the legislative history in light of *PASNY.*

In the beginning of this century, Congress did use end-use preferences. *See, e.g.,* the Reclamation Act of 1906, 43 U.S.C. § 552; the Raker Act, 38 Stat. 242 (1913), and the Salt River Project, 43 U.S.C. § 598 (1922). However, by 1928, Congress replaced the end-use preference with preferences for specified classes. *See* Boulder Canyon Project Act, 43 U.S.C. § 617d(c), which grants preference only to a "State." Beginning in 1933,[9] Congress began to justify

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[9] *See* the Tennessee Val"ley Authority Act, 16 U.S.C. § 831i (1933);

this federal-type preference to particular classes on the basis of yardstick competition. In *PASNY*, the Second Circuit found that Congress rejected an end-use preference, and instead adopted a federal-type preference for 50 percent of the Niagara Project power. 743 F.2d at 105.

The term "public bodies" was first used in the context of federal preference policy in 1937 in the Bonneville Power Act, 16 U.S.C. § 832b, which defines the term as states, public power districts, counties and municipalities, including their agencies or subdivisions. Nothwithstanding that broad definition, another provision, 16 U.S.C. § 832c(d) appears to limit the meaning of "public bodies" to *distributors* of electric energy (emphasis added):

> It is declared to be the policy of the Congress . . . to afford such *public bodies* or cooperatives reasonable time and opportunity . . . legally to become qualified purchasers and *distributors* of electric energy available under this chapter.

Section 5 of the Flood Control Act of 1944, 16 U.S.C. § 825s, is the only statute according preference in the sale of federal power that is mentioned in House Report No. 862, explaining the compromise bill that became the NRA. That provision states, simply, that "[p]reference in the sale of such power and energy shall be given to public bodies and cooperatives." In 1955, while some of the predecessor bills to the NRA were pending before Congress, the Attorney General interpreted Section 5[10] *in pari materia* with 16 U.S.C. § 832c(d) and spoke of preference customers as being *distributors* of power. Indeed, the purpose

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the Rural Electrification Administration Act (loans, now power), 7 U.S.C. § 904 (1936); the Bonneville Power Act, 16 U.S.C. § 832b (1937); the Fort Peck Project Act, 16 U.S.C. § 833b (1938); the Flood Control Act of 1944, 16 U.S.C. § 825s; the Eklutna Project Act, 64 Stat. 382 (1950); the Falcon Dam Act, 68 Stat. 255 (1954); and the Atomic Energy Act Amendments of 1954, 42 U.S.C. § 2064.

[10] 41 Op.A.G. 236, 243 (1955).

of the preference clause was understood in the years just prior to 1957 "to insure adequate supplies of power at the lowest possible cost to nonprofit and public and semipublic distributors."[11]

The Committee which reached the compromise that was enacted as the NRA used the terms "public bodies" and "public distribution systems" in two adjacent and related paragraphs which discuss the compromise between federal preference advocates and New York State interests. H. Rep. No. 862, *reprinted in* 1957 U.S. Code Cong. & Ad. News 1585, 1593. Indeed, the statute itself uses the terms "sale and distribution" in the precatory language. 16 U.S.C. § 836(b)(1). Under these circumstances, we conclude that only publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail are public bodies under the NRA. *See PASNY*, 743 F.2d at 103, where the Second Circuit uses the term "municipal utilities" for public bodies.

VDPS cannot be a "public body" within the purview of the NRA because it does not own a retail distribution system. It acts as a wholesale broker of power to public bodies, nonprofit cooperatives, investor-owned utility companies and an industrial company. While VDPS can negotiate with PASNY as a "bargaining agency," it may only procure preference power on behalf of public bodies and nonprofit cooperatives in Vermont.

It is likewise improper to treat MTA as a public body. While VDPS is a power wholesaler (Tr. 2620), MTA is a power consumer. This difference is irrelevant under the NRA, however, because in both cases the sale of preference power to these applicants would defeat yardstick com-

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[11] III Report of the Task Force on Water Resources and Power for the Commission on Organization of the Executive Branch of the Government, "The Preference Clause in Federal Electric Power Development and Distribution," 1107, 1110-11 (1955). (Footnote omitted).

petition. While MTA contends that it is in fact a distributor of preference power "to its own operating subsidiaries" (Exceptions at 16), this argument ignores the fact that the precatory language of the NRA refers to distribution of preference power "to the people as consumers." 16 U.S.C. § 836(b)(1). MTA ignores the words "as consumers," as well as the phrase "to whom such power shall be made available." In context, the words "as consumers" means "as consumers of the power," and not as consumers of the goods or services that are produced by the consumption of the power by others. We also reject MTA's contention (Exceptions at 46) that the NRA contains a preference for power-users, such as "defense projects" and "government installations." The Clark and Javits bills both did propose a preference for "defense agencies of the United States." However, the compromise bill that became the NRA did not include this preference. As Senator Clark said, in the NRA the project power is "divided into two parts, one-half to go to private power interests, and the other half to be reserved under the normal Federal preference clause." 103 Cong. Rec. 14,439 (1957).

Nor is it determinative that municipal utilities may use some of their preference power for municipal purposes. (*See* MTA Exceptions at 50). Federal preference policy does not limit the uses to which preference power can be put by entities that are entitled to receive that preference power. Thus, publicly-owned distributors and sellers of electricity can supply a municipality the power it requires to provide municipal services. By focusing on the recipient rather than the use, Congress hoped to instill competition into an otherwise monopolistic market. The allocation of preference power to MTA, which provides no competitive pressure in the market for electricity, would withdraw a significant amount of power from the competitive marketplace, thereby diminishing the role Niagara Project power can play in reducing electric rates through yardstick competition. We agree with the presiding judge that the

legislative history demonstrates that MTA is not eligible to receive preference power. Initial Decision at 22.

In light of the fact that the precatory language of the NRA specifically mentions "sale and distribution," we conclude that Congress intended to confer a preference only upon publicly-owned distributors and sellers of electricity, who are capable of selling and distributing this power to the people as consumers of electricity. We therefore hold that (1) MTA may not be allocated any of the preference power from the Niagara Project, and (2) VDPS as a bargaining agency may be allocated preference power only to the extent it acts for public bodies and nonprofit cooperatives. Of course, the MTA may make purchases from the non-preference half of the project's output.

IV. The Allocation Methodology

Although the NRA directs PASNY to make a reasonable portion of Niagara Project power available to public bodies and nonprofit cooperatives in neighboring states, the statute recognizes that disagreements might arise between PASNY and the power-marketing agencies of those states. 16 U.S.C. § 836(b)(2). Consequently, the statute authorizes this Commission to "determine and fix the applicable portion of power to be made available and the terms applicable thereto. . . ." *Id.* In this section we will set forth the principles which PASNY should apply in allocating 10 percent of the Niagara Project's power among the preference customers in the neighboring states who are entitled to receive preference power.

The presiding judge chose an apportionment methodology on the basis of the NRA, even though he found that "[t]he NRA prescribes no particular method of apportionment." Initial Decision at 24. Several of the parties contend that the allocation of preference power should be made according to a comparative benefits test. (*See e.g.*, Allegheny Exceptions at 75-83; Vermont Exceptions at 6-17). We agree with the presiding judge that it is the NRA,

and not the Federal Power Act (FPA), that controls how preference power should be apportioned. Accordingly, we reverse our finding in *Vermont* that preference power should be allocated on the basis of the public interest standard of the FPA, 16 U.S.C. § 803(a). 55 F.P.C. at 1137-38.

The 1957 Congressional Hearings on the Clark and Javits bills include in full our decision in *Power Authority of the State of New York*, 12 F.P.C. 172 (1953). Hearings at 96-112. In that decision, we stated that the FPA does not authorize this Commission to create on its own a preference for municipalities and cooperatives. Hearings at 96-112. In that decision, we stated that the FPA does not authorize this Commission to create on its own a preference for municipalities and cooperatives. Hearings at 99. Being aware of the Commission's disclaimer of authority to create a preference under the FPA, we believe that when Congress "expressly authorized and directed" the Commission in the NRA to issue a license to PASNY, and to include in the license specified conditions providing a power purchasing preference for "public bodies and nonprofit cooperatives within economic transmission distance," it intended the NRA to control our decisions on the implementation of these preferences.

The NRA provides no clear method of allocating preference power among preference customers and in no way indicates that a comparative benefits test is necessary. Indeed, all Congress said was that it expected the primary beneficiaries of preference power to be rural and domestic consumers. Although we disagree with the judge's finding that VDPS is itself a preference customer, we do not differ with his finding "that the most reasonable method of apportioning Niagara power among out-of-state preference customers is one which uses the number of residential customers (domestic and rural) served by each preference customer." Initial Decision at 29. While we have found the NRA to contain no end-use preference, we recognize

that Congress did have an expectation that the preference power would be used "primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use." 16 U.S.C. § 836(b)(1). Thus, while we do not find that the statute compels our adoption of the allocation methodology chosen by the judge, on the basis of our discretion, we affirm the judge's conclusion that this method is best because it "pays proper heed to the Congressional directives that the primary beneficiaries of Niagara preference power are to be rural and domestic users, and that the power is to be made available to preference customers in a manner which encourages the widest possible use." Initial Decision at 29.

When PASNY negotiates with state bargaining agencies, it should recognize that these bargaining agencies may procure preference power vicariously only on behalf of public bodies and nonprofit cooperatives that are entitled in their own right to receive preference power. Each preference entity should make available to PASNY the number of domestic and rural consumers served. Domestic and rural consumers served by preference customers that cannot receive the preference power, such as members that may be beyond economic transmission distance of the Niagara project, should not be counted. The power should then be allocated among the preference customers according to their percentage of the total number of domestic and rural customers who can be served by these preference entities. Once the power is sold to these preference customers, however, our regulatory function must end, because the NRA attaches no strings to the ultimate retail distribution of preference power sold to preference customers. *PASNY*, 743 F.2d at 104-05.

For the purpose of allocating preference power, the term "domestic" shall be defined as "residential," wherever located, and the term "rural" shall be construed to mean

"farm," whatever the size. These definitions reflect the context of the phrase "domestic and rural consumers" in the NRA, immediately following the phrase the people as "consumers." *See* 16 U.S.C. § 836(b)(1). We therefore disagree with the construction of these terms in *Vermont.* 55 F.P.C. at 1116. Since we must here divide a precious resource that is in short supply among many preference customers, we have decided to allocate this commodity according to a more narrow reading of the congressional expectation.

The Initial Decision found, at 34, that CMEEC, MMWEC and Lansdale have "legal entitlements" to preference power, and no party has claimed on exceptions that the municipal distribution systems for which CMEEC and MMWEC would procure the power, or that Lansdale's distribution system, are not within economic transmission distance of the Niagara project. But the initial Decision, at 35-37, refused allocations of firm and peaking power for those entities on the ground that firm transmission service was not available. In the case of CMEEC and MMWEC, there was a "bottleneck" in west-to-east transmission service within New York, and in the case of Lansdale there was a refusal within Pennsylvania to provide wheeling service for 1-1/2 miles. We have been informed on brief, however, that there will be no west-to-east transmission "bottleneck" within New York subsequent to June 30, 1985, and that Lansdale is constructing its own 1-1/2-mile transmission line. Consequently, as a practical matter, we do not need to review this determination of the judge because we have decided to limit the relief ordered to the period, beginning in July 1985, when PASNY begins to provide service under new contracts.

However, in order to guide PASNY in drafting these contracts, we will briefly state our views on why we are making the capability of receiving power an allocation criterion. While Congress did not make the capability of receiving the preference power an entitlement criterion,

transmission service is necessary to permit enjoyment of the energy. Accordingly, we find that the availability of such service should be an allocation criterion in order to ensure that this valuable resource is used in an economical fashion. When the necessary transmission service within New York cannot be made available at the beginning of a contract period, the affected allocations (the power and associated energy) for preference customers in states neighboring New York should be reallocated temporarily among the other preference customers in neighboring states. Although PASNY is not responsible for arranging or providing transmission service outside New York, it should treat preference customers in neighboring states that encounter transmission problems outside New York the same as it treats such customers with transmission problems within New York. Within a reasonable time to be fixed by PASNY, bargaining agencies and preference customers should be given an opportunity to propose a feasible plan for overcoming such problems. PASNY should reallocate temporarily the affected allocations of both the power and the associated energy among the other preference customers in neighboring states. However, once the plan is executed and the affected customers acquire the capability of receiving the energy, PASNY should ensure that these preference customers receive their allocation.

V. Miscellaneous Matters

A. The Relief

The Second Circuit's opinion in *PASNY* is our guide in fashioning relief. First of all, we must design a remedy that is "reasonably commensurate with the needs of the case." 743 F.2d at 112. Second, we must recognize that "[t]he purpose of the remedy is not to punish or confer a windfall on the complainant." *Id.* Finally, "the remedy cannot be fashioned in a vacuum; it must be designed with the injury in mind so that the least disruptive correction is ordered." *Id.* at 113.

Initially, MMWEC and CMEEC asked the Commission to fix 10 percent of the project power as the reasonable amount for use in states neighboring New York and, also, to allocate a fair share of that power for their respective states. Today, CMEEC asks the Commission (Exceptions at 49) to "fashion a prospective remedy that will make whole the Complainants wrongfully deprived of project power." MMWEC is more specific (Exceptions at 92-97), and asks for a "bank" of denied allocations that would be cashed by June 30, 1985, or for an allocation to June 30, 1985, and an order that would prohibit PASNY from reducing the allocation prior to 1990,[12] stating

> MMWEC will again state its willingness to forego the benefits it should have enjoyed for the past four years, and should enjoy between now and whenever the Commission issues its decision, if it can at least be assured that, at the conclusion of this proceeding and after the issuance of that decision, MMWEC will obtain Niagara power for a reasonable period of time.

(Exceptions at 93-94). (Footnote omitted).

PASNY contends (Opposition at 76-78) that since the contracts at issue expire simultaneously on June 30, 1985, no relief should extend beyond that date. Joined by AMP-Ohio (Opposition at 13-17), PASNY also contends that, in any event, the Commission's authority to order relief is limited to determining and fixing the applicable portion of power "to be made available" in the future through June 30, 1985, when the present contracts expire. The Massachusetts Group adds (Opposition at 40-41) that MMWEC and CMEEC should be made whole from those who receive the power through June 30, 1985, but not from those who

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[12] MMWEC notes that since there are more applicants for allocations of preference power subsequent to June 30, 1985, the allocations will likely be smaller. (Exceptions at 94 n. 1).

may receive the power after that date. Joining AMP-Ohio, Allegheny (Opposition at 74-79) and VDPS (Opposition at 35), assert that since they are not wrongdoers, it would be inequitable to take power from them after June 30, 1985, to compensate for what was done in the past. MMWEC also claims (Exceptions at 23-24) that CMEEC and MMWEC should have been allocated all of the interruptible power and energy, rather than proportionate shares, if they were properly denied their shares of firm power and energy. AMP-Ohio, on the other hand, insists upon its portion of each category of power and energy, stating (Opposition at 12) that it is not AMP-Ohio's fault that CMEEC and MMWEC do not have firm transmission service.

The Initial Decision, at 39, ordered PASNY, in effect, to reallocate among Allegheny, AMP-Ohio and VDPS for the balance of the contract period ending June 30, 1985, 10 per cent of the Niagara firm power (188 MW) and 3-3/4 percent of the Niagara peaking power (15 MW).[13] While we would modify those reallocations to conform to this opinion and order, such modifications would require, among other matters, the development of uniform figures for counting domestic and rural consumers in the manner specified in the preceding section. Considering the short time remaining in the contract period, we doubt that the parties can develop the figures sufficiently in advance of the end of the period to permit any meaningful relief

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[13] The Initial Decision, at 40, also ordered PASNY to reallocate among Allegheny, AMP-Ohio, CMEEC, MMWEC and VDPS "10 percent of the nonfirm Niagara power," or 20,000 kW. In the light of the identification and quantification of categories of Niagara power and energy in *Vermont*, which were used herein, we assume that the Initial Decision was reallocating 20,000 kWh (or, probably, 20,000 MWh) of peaking interchange energy. However, we have not attempted to resolve any of the associated exceptions because, as discussed in this paragraph, we are not providing any relief for the contract period ending June 30, 1985.

through June 30, 1985. Consequently, we are vacating, rather than modifying, the relief ordered by the Initial Decision.

Since the issues herein will soon become moot for the contract period ending June 30, 1985, we have decided instead to make this decision binding in the future. Our focus in this declaratory opinion and order is to provide guidance and relief for the period subsequent to June 30, 1985. PASNY should make future allocations to preference customers according to the principles set forth herein. We have decided that preference customers in states neighboring New York, including Connecticut and Massachusetts, are entitled to 10 percent of every classification of Niagara power and energy sold, both presently and for the foreseeable future, and that they are receiving less than their entitlement.[14] Accordingly, we are requiring PASNY to increase the allocations to 10 percent, subsequent to June 30, 1985, when the contracts with Allegheny, AMP-Ohio, PSB (VDPS) and MTA expire. Since we have decided that PASNY may neither sell preference power to MTA, nor to VDPS for resale to industrial and investor-owned utility companies, we are prohibiting PASNY from doing so after that date.

On the other hand, we decline to grant any relief to compensate in future contract periods for the lack of allocations in the contract period ending June 30, 1985, or to allocate one classification of preference power and/or energy to compensate for the lack of an allocation of a

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[14] The Compliance Report that PASNY filed for 1983 pursuant to Ordering Paragraph (G) of Opinion No. 151 confirms the earlier-dated figures in the record. In 1983, 7.7 percent of all classifications of Niagara power and 5.6 percent of all classifications of Niagara energy were sold for use in states neighboring New York. Those states were shortchanged 2.62 percent of the firm energy (316,762 MWh), 1.95 percent of the peaking energy (9,288 MWh) and 10.00 percent of the peaking interchange energy, excluding inter-project transfers (20,139 MWh). Official notice is taken of this filing.

different classification. In both cases, there is merit to the argument that some sort of recompense would be appropriate. However, since the supply of preference power and/or energy is finite, any recompense would be at the expense of other customers. We find that it would be at the expense of other customers. We find that it would be unduly punitive to reduce the allocations of customers which were not at fault. Considering that neither those who received too much nor those who received too little (or none) were at fault, we have concluded that the least disruptive correction would be the one that requires the preference power and energy to be reallocated in the manner contemplated by this opinion and order for the period after June 30, 1985. *See PASNY*, 743 F.2d at 113.

Finally, we have concluded that it is now time to bring Ordering Paragraph (B) of the *Vermont* decision, and Ordering Paragraph (G) of the order issued November 2, 1979, in the *MEUA* proceeding, up to date, and to require PASNY subsequent to June 30, 1985, to make available for use in neighboring states 10 percent of every classification of Niagara power and energy sold. As the power and energy are now classified, that includes 10 percent of the firm power and associated energy sold, 10 percent of the firm (paragraph A) peaking power and associated energy sold, 10 percent of the paragraph B peaking power and associated energy sold, and 10 percent of the peaking interchange energy sold —but excludes the peaking interchange energy that is used to support firm energy obligations on PASNY's system only and, consequently, is not sold. (*See* PASNY Opposition at 66-69).

B. The Late Intervention

On April 29, 1983, the New York Industrials filed a petition to intervene late, stating that they were a party to the *MEUA* proceeding involving preference power for New York; that they did not know until the issuance of Opinion No. 151-A on April 6, 1983, that the "public bod-

ies" issue was pending in this proceeding involving preference power for neighboring states; and that, as purchasers of expansion power, they have a substantial interest in the decision of that issue that is not adequately represented by any party to this proceeding. MEUA filed an opposition on May 13, 1983, appending evidence that the New York Industrials knew at least as early as December 1982 that the "public bodies" issue was pending herein, and that parties to this proceeding may be prejudiced by their inability to respond to the New York Industrials' arguments on brief. While we have serious doubts that the New York Industrials have made an adequate showing to be permitted to intervene late, we will permit their intervention in this instance because of their participation in the *MEUA* proceeding, and our decision in Opinion No. 151-A to reconsider the "public bodies" issue in this case.

C. The Post-Briefing Filings

On August 15, 1984, the United States Court of Appeals for the Second Circuit decided the appeal of the Commission's *MEUA* decision in *PASNY*. On August 21, 1984, MMWEC filed a motion to lodge with the Commission a copy of the Second Circuit's decision in typewritten form, commenting briefly on the relevance of the decision to the issues herein. In response, the parties attempted to argue about the significance of the *PASNY* opinion in relation to the issues in this case. Rule 711 of the Commission's Rules of Practice and Procedure, 18 CFR § 385.711, authorizes participants to file a brief on exceptions and a brief opposing exceptions within certain time limits, and then provides, "No additional briefs are permitted, unless specifically ordered by the Commission." Although the foregoing fillings purport to be motions and answers, we are treating them as unauthorized briefs on the merits, and, consequently, we have not considered any of them, or their attachments, with the sole exception of the Second

Circuit's decision, in connection with our decisions on the merits of the issues in this case.

The Commission finds and declares:

(1) The Commission's 1976 *Vermont* decision, 55 F.P.C. 1109, pertaining to preference power for states neighboring New York, should be reaffirmed and adopted insofar as it determines that the term "neighboring States" is not limited to Ohio and Pennsylvania, and, consequently, allows the sale of preference power for use in Connecticut, Massachusetts and Vermont, among other states.

(2) The MTA is not a "public body" under the NRA. Congress intended to limit the meaning of the term "public bodies" in Section 1(b)(1) of the NRA, 16 U.S.C. § 836(b)(1), to publicly-owned sellers and distributors of electricity at retail.

(3) The Commission's 1976 *Vermont* decision, 55 F.P.C. 1109, should be overruled insofar as it determines (A) that VDPS is a "public body" within the purview of the NRA, and (B) that the NRA "does not preclude distribution of Niagara power through investor-owned utilities to those intended to be benefitted."

(4) The Commission's 1976 *Vermont* decision, 55 F.P.C. 1109, should be overruled insofar as it decides who is entitled to purchase preference power, and how the power is apportioned, on the basis of subjective judgments under the "public interest" standard of the FPA. The entitlement criteria of the NRA are controlling and the Commission has discretion to fashion an allocation methodology consistent with the principles of the NRA.

(5) Any public body or nonprofit cooperative in a state neighboring New York within economic transmission distance of the Niagara project is entitled under the NRA to an allocation of preference power.

(6) Subject to the four-to-one statutory division of preference power between New York and its neighboring

states, preference power shall be apportioned between New York and its neighboring states without discrimination. Preference power should be apportioned among preference customers within neighboring states, in accordance with the number of domestic and rural consumers of the preference entities. However, PASNY is not required to provide power or the energy associated with that power to a preference customer in a neighboring state, when the necessary transmission service is not available at the beginning of a contract period. Until such service becomes available, PASNY may reallocate that power temporarily among other out-of-state preference customers.

The Commission orders:

(A) The Initial Decision issued March 9, 1983, is affirmed as modified herein, but the relief ordered therein is vacated.

(B) The Commission's 1976 *Vermont* decision, 55 F.P.C. 1109, is reaffirmed and adopted insofar as is specified in Finding and Declaration Paragraph (1), and is overruled insofar as is specified in Finding and Declaration Paragraphs (3) and (4).

(C) Subsequent to June 30, 1985, PASNY may only sell preference power to publicly-owned sellers and distributors of electricity at retail, to nonprofit cooperatives, or to bargaining agencies in neighboring states acting on the behalf of such preference entities.

(D) Subsequent to June 30, 1985, PASNY may only sell MTA non-preference power.

(E) PASNY may not refuse to allocate preference power to public bodies or nonprofit cooperatives subsequent to June 30, 1985, on any grounds other than their failure to comply with the requirement of this opinion; but PASNY may reallocate the power temporarily pending the commencement of the necessary transmission service.

(F) Subsequent to June 30, 1985, PASNY shall make available to preference customers in states neighboring New York 10 percent of every classification of Niagara power and energy sold.

(G) Bethlehem Steel Corporation, General Motors Corporation, Occidental Chemical Corporation-HOOKER Industrial & Specialty Chemicals, Olin Corporation and Union Carbide Corporation are permitted to intervene herein pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 CFR § 385.214; *provided,* that their participation as intervenors shall be limited to matters affecting asserted rights and interests specifically set forth in their collective petition to intervene; and, *provided further,* that their admission as intervenors shall not be construed as recognition by the Commission that they might be aggrieved by any order entered in this proceeding; and, *providing further,* as set forth in Rule 214(d)(3)(II), that they accept the record of this proceeding as it was developed prior to the late intervention.

(H) All exceptions not granted are denied.

By the Commission. Commissioner Stalon dissented with a separate statement to be issued later.

/s/KENNETH F. PLUMB
Kenneth F. Plumb,
Secretary.

Docket Nos. EL80-19-000
and -004, *et al.*

Issued April 9, 1985

STALON, COMMISSIONER, *dissenting:*

A good decision by a regulatory body should not encourage uneconomic activity on the part of economic decision units in the society. By inviting continuing disputes over the Niagara Project's low cost power for years to come, this decision fails this test.

The Niagara Project's value to the preference customers is immense. Collectively, these customers save several hundred million dollars annually by buying preference power instead of having to generate or purchase power at current cost. It is in every customer's individual interest to vigorously litigate the case to capture economic rents of this magnitude. As changes occur in transmission technology and in the number and size of cooperatives and public bodies, the allocation of the project's benefits will have to change as well. At every stage, the litigants have the incentive to spend tremendous sums on money on lawyers and consultants to get a larger share of the Niagara pie.

The logical outcome of the sequence of decisions that this order puts in place and legitimizes is to slowly exhaust the economic rents that are inherent in the neighboring states' share of Niagara power. Clearly these parties, by force of circumstance, will be required to engage in an expenditure of real economic resources up to the amount of rent they expect to receive. As transmission facilities improve and a larger number of "public bodies" become eligible, these new bodies will be compelled to engage in this squabble for rents. The consequence will be a squabble that will continue until all economic rents are used up in legal fees and/or in other uneconomic expenditures by the parties to capture the Niagara project's benefits—or until the Commission ends the litigation.

I believe that we can eliminate much of this dispute by adopting an alternative procedure. I appreciate others' view that, while my recommendations have merit, they are not workable within the constraints imposed by the law and the record in this case. But I believe that my recommendations are legally sound, are supported by the record, and should be implemented. The basic elements of my alternative procedure, including the legal and policy arguments in favor of it, are as follows:

1. Allocation Methodology

The purpose of the Niagara Act's allocation to out-of-state entities was to ensure that the project's benefits were not absorbed exclusively by New York customers. Thus, the statute directs that customers in neighboring states be given a share of the project's power—but does specify how to allocate the neighboring states' respective shares. A natural and simple way to divide the power among the neighboring states is on the basis of their populations. If two neighboring states are equal in population, it is logical that they should receive an equal amount of power (assuming their preference customers can use the power). While other methods are also reasonable (e.g., giving the states different amounts of power based on their different numbers of domestic and rural customers), using population would eliminate disputes about the data base used in making the allocations.

While this would not further implement the precatory language in Section 1(b) about domestic and rural consumers, it is not necessary for the allocation method to do so. Congress' method of insuring that the people as consumers, particularly domestic and rural consumers, were the primary beneficiaries of the preference power, was to choose public bodies and non-profit cooperatives as the sole preference power recipients. Congress then imposed no end-use restrictions on the preference bodies.

Indeed, using population as the allocation method avoids the anomoly of allocating power to "neighboring states" on the basis of end-use when end-use may not be taken into account in determining whether an entity is entitled to be allocated power. While on the one hand, using an end-use test in allocating power furthers the purposes underlying the precatory language (the same argument made by PASNY in favor of an end-use test in furnishing the power), on the other it imposes an end-run around the Second Circuit's rejection of an end-use test. A pure population test is legally sound and eliminates squabbles among the parties over usage and customer numbers.

The statute does not require that the neighboring states get 10% of the power—only that their required share may not exceed 10%. The statute gives no guidance on how much power to give to the out-of-state entities in the event in-state needs exceed 40% (an event that should happen soon). Given the relative actual and potential demands of out-of-state and in-state preference bodies, we should clarify that out-of-state entities should receive a full 10% share in the future.

2. Public Bodies

The Niagara Act does not define the term "public body." The order states that only "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail are public bodies," and concludes that the Vermont Department of Public Service (VDPS) is not a public body (since it does not sell electricity at retail). I do not believe that this conclusion is compelled by the statute; to the contrary, the plain meaning of the term "public body" is simply any government body. *See* Ballentine's Law Dictionary 1020 (1969). The statute does contemplate that the power be made available for the people as consumers, but it fails to distinguish between public entities that sell at retail and those (such as VDPS) that do not distribute the power themselves.

And furthering "yardstick competition," while a purpose of the preference provisions (regretably so, since an entity's ability to price electricity cheaply because of access to a cheap power source provides no meaningful yardstick against which to measure the performance of an entity that has no access to the cheap power source), does not dictate such a differentiation. By spreading the project's benefits to investor-owned (rather than publicly-owned) utilities whose rates must be just and reasonable, "yardstick competition" against utilities without such power would still exist (although I do not advocate my approach on this ground). In short, the plain meaning of the statute should prevail.

My conclusion that VDPS is a public body is not in conflict with the Second Circuit's ruling that the Niagara Act contains no end-use preference. *Power Authority of the State of New York v. FERC*, 743 F.2d 93, 104 (2d Cir. 1984). The order is correct in concluding that the Presiding Judge's decision (22 FERC ¶ 63,087 (1983)) and the Commission's *Vermont Public Service Board v. Power Authority of the State of New York (Vermont)* decision (55 F.P.C. 1109 (1976)) on this issue are undermined by the Second Circuit's ruling, because those orders' conclusion that VDPS was a public body was based in part on the fact that VDPS would ultimately distribute the power to domestic and rural consumers. Finding VDPS to be a public body, it was concluded, furthered the presumed end-use preference for these customers. My conclusion about VDPS, on the other hand, does not presume that there is an end-use preference; to the contrary, once a public body receives the power, it may sell it to anyone. And I do not believe that the plain language of the statute requires an entity to sell the power at retail to qualify as a public body.

Finding VDPS to be a public body is also preferable from a policy perspective. A significant problem with the proposed order is that it encourages the construction of

uneconomic transmission facilities. Landsdale in fact is now building a 1.5 mile transmission line, solely to get its share of the economic rents from the Niagara Project. The commission should do everything it can to discourage this kind of uneconomic investment. Declaring VDPS a public body should substantially reduce the incentive for preference entities to engage in this kind of investment, because it would encourage other states to follow Vermont's lead to spread the project's benefits around. According to MMWEC, several states already plan on doing this if we affirm *Vermont* and the judge in this respect. We should so affirm, as it would minimize the damage to economic efficiency that the majority's interpretation of this statute causes. It would also serve the statutory goal of making the project's benefits available as widely as possible.

3. Reasonable Economic Transmission Distance

Under the state, the burden falls upon PASNY to determine whether an entity is in "reasonable economic transmission distance." Thus, the ultimate responsibility for making this decision rests with the Commission, as the various parties challenge each other's qualification under this standard. I expect the arguments here to be particularly lengthy, as each party brings in its experts to prove that it is in economic transmission distance and that the others are not. Unlike its treatment of the allocation methodology question, however, the order gives little guidance on "what reasonable economic transmission distance" means. I think we should do so.

The basic purpose behind the economic transmission distance requirement was to ensure that the difference between the cost of Niagara power and a preference body's generated (or purchased) power—i.e., the gross savings—exceeded the cost of transmission. I believe this is what reasonable economic transmission distance means. The problem arises when the element of time is introduced into the calculation. While the cost of firm Niagara power is

presumably static, a preference body's generating cost will vary significantly over time. In addition, the cost of transmission varies tremendously between peak and off-peak loads on the system. Unless we rule on this question now, we can expect the parties to the next complaint proceeding to introduce evidence on their and others' presence within economic transmission distance at various points in time. This would be a costly and largely fruitless effort.

The Presiding Judge implied that all customers in Vermont, Connecticut, Massachusetts, Ohio and Pennsylvania are within economic transmission distance. 22 FERC at 65,284. In his 1975 decision in the *Vermont* case, Judge Levant appeared to use average annual transmission costs to determine reasonable economic transmission distance. 55 F.P.C. at 1132-35. I think the judges were on the right track.

We could fairly conclude, given the low cost of Niagara power, the much higher average cost of power throughout the Northeast, and the average annual cost of transmitting power in the area, that all customers in neighboring states are within reasonable economic transmission distance of the Niagara Project. I would hesitate to do so in this order only because of the lack of record evidence on this question. But we should lay out the guidelines for determining reasonable economic transmission distance.

The most important guideline to be established is that average (preferably average annual) generation and transmission costs should be used to determine whether an entity is within reasonable economic transmission distance. We should also establish that, for entities connected to the transmission grid, average statewide transmission costs should be used for the determination. These methods of determining reasonable economic transmission distance are consistent with the statute; there is nothing in the statute or legislative history to suggest that finer methods should be used. By establishing these reasonable guidelines, we

should be able to eliminate a great deal of the litigation over who qualifies as within reasonable economic transmission distance. It is readily apparent that virtually everyone in the Northeast would meet this test.

4. Length of PASNY's Contracts

One of the most serious problems that the order leaves open is whether PASNY can enter into long-term contracts with its preference customers. Unless it is able to, any allocation it devises, even if fully consistent with the proposed order, is going to be subject to repeated challenges as preference bodies change in size and number. The problem will get even more complicated in 1990 after the in-state investor-owned utility contracts expire, and New York's preference customers' needs exceed 40% of the Niagara project's power—opening the question of whether the out-of-state customers' share should drop below 10% (unless the procedure I recommend above on this question is adopted). Without long-term contracts, PASNY's allocation plan will be the subject of endless litigation at the FERC.

I do not believe the statute requires PASNY or the Commission to continually fine-tune its allocation. While it would be contrary to the statute to allocate the power for an unreasonable length of time, it would be proper for the Commission to invite all parties interested in the power to appear before the Commission in an allocation proceeding and to fix the allocation for a reasonable length of time (e.g., ten years).

The proposed order gives PASNY no guidance on whether it can set long-term contracts. We should expressly approve (indeed, encourage) such a procedure as a fair balancing between the changing needs of preference customers and all parties' mutual interest in not relitigating the allocation on a continual basis.

These are the basic elements of my proposal. There are other ways in which I would take a different approach

from the order; e.g., the Commission should, based on the language of Section 1(b)(2) of the Niagara Act, require preference customers, in an allocation proceeding, to be represented by power marketing agencies, and leave the allocation within a neighboring state to the state bargaining agency. And, these recommendations could be adopted singly, rather than as a group; to the extent they are accepted, they would reduce litigation and improve the result in this case. But I cannot concur in an order that, while within the confines of the law, will produce excessive, lengthy, and unseemly fights for this resource. There is another approach available, outlined here, that meets the law's requirements yet substantially reduces litigation. I advocate its adoption.

/s/ CHARLES G. STALON
Charles G. Stalon
Commissioner

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. EL80-19-000

MASSACHUSETTS MUNICIPAL WHOLESALE
ELECTRIC COMPANY
v.

POWER AUTHORITY OF THE STATE OF NEW YORK

Docket No. EL80-24

CONNECTICUT MUNICIPAL ELECTRIC
ENERGY COOPERATIVE
v.

POWER AUTHORITY OF THE STATE OF NEW YORK

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

(March 9, 1983)

APPEARANCES

David R. Straus, Scott Strauss, Thomas C. Trauger and *Maurice J. Ferriter* for Massachusetts Municipal Wholesale Electric Company

James F. Fairman, Jr., Grace Powers Monaco, Barry R. Lenk, Laurie Levin and *Robert Sussler* for Connecticut Municipal Electric Energy Cooperative

Vincent J. Tobin, Wendy M. Lane, Karen A. Kimmel, Gerald C. Goldstein, Barry Fischer and *Thomas R. Frey* for Power Authority of the State of New York

Renee Schwartz, Laurens Schwartz and *Paul Chessin* for Metropolitan Transportation Authority

Edward R. Muller, Lowell D. Turnbull and *Edward Berlin* for New York State Electric & Gas Company

J. Cathy Lichtenberg, Mark S. Laufman, John Wyeth Griggs and *Wallace L. Duncan* for Municipal Electric Utilities Association of New York State

Willaim C. Wise, Robert Weinberg and *William E. Mowatt* for Allegheny Electric Cooperative, Inc.

Reuben Goldberg, Channing D. Strother, Jr., June W. Wiener, Craig A. Glazer and *Thomas E. Wagner* for City of Cleveland, Ohio and American Municipal Power—Ohio

William I. Harkaway, G. Douglas Essy and *Gerald R. Tarrant* for The Vermont Department of Public Service and Vermont Public Service Board

Douglas A. Eldridge for New York State Energy Office

Donal F. McCarthy for Consolidated Edison Company of New York, Inc.

Woodrow D. Wollesen for Borough of Lansdale, Pennsylvania

Carmen Gentile and *Jay Hickey* for Boston Edison Company, Cambridge Electric Company, Commonwealth Electric Company, Eastern Edison Company, Fitchberg Gas and Electric Company, Massachusetts Electric Company and Western Massachusetts Electric Company

Richard Miles and *Paul Hartley* for the Staff of the Federal Energy Regulatory Commission

LEWNES, PRESIDING ADMINISTRATIVE LAW JUDGE:

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HISTORICAL BACKGROUND OF THE NIAGARA PROJECT

This proceeding relates to the allocation of power generated by the Niagara Project No. 2216 to out-of-state entities under the terms of the Niagara Redevelopment Act (NRA).[1]

The NRA, enacted by Congress on August 21, 1953, empowered the Power Authority of the State of New York (PASNY) to construct and operate the Niagara power plant to utilize the portion of the waters of the Niagara River allotted to the United States by treaty with Canada.[2] As directed by the NRA, the Federal Power Commission (FPC) in 1958 issued a license to PASNY,[3] and the plant began commercial operation in 1961.

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[1] 16 USC § 836.

[2] Treaty Concerning Uses of the Waters of the Niagara River dated February 7, 1950 (TIAS 2130).

[3] *Power Authority of the State of New York*, Project No. 2216, 19 FPC 186.

The proposed enactment of the NRA had been surrounded by a cloud of controversy relating to the extent to which a federal-type preference policy should apply to the project, and the amount of power to be allocated to preference customers in neighboring states. The enacted NRA stated (16 USC §836(b)):

(1) In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and non-profit cooperatives within economic transmission distance. In any case in which project power subject to the preference provisions of this article is sold to utility companies organized and administered for profit, the licensee shall make flexible arrangements and contracts providing for the withdrawal upon reasonable notice and fair terms of enough power to meet the reasonably foreseeable needs of the preference customers.

(2) The licensee shall make a reasonable portion of the project power subject to the preference provisions of paragraph (1) available for use within reasonable economic transmission distance in neighboring States, but this article shall not be construed to require more than 20 per centum of the project power subject to such preference provisions to be made available for use in such States. The licensee shall cooperate with the appropriate agencies in such States to insure compliance with this requirement. In the event of disagreement between the licensee and the power-marketing agencies of any of such States, the Federal Power Commission may, after

> public hearings, determine and fix the applicable portions of power to be made available and the terms applicable thereto: *Provided,* that if any such State shall have designated a bargaining agency for the procurement of such power on behalf of such State, the licensee shall deal only with such agency in that State. The arrangements made by the licensee for the sale of power to or in such States shall include observance of the preferences in paragraph (1) of this subsection.

The license issued to PASNY incorporated these marketing conditions *verbatim.*

In 1960, PASNY began negotiating the sale of the power to be produced by the plant, selling 445 MW to Niagara Mohawk Corporation as replacement power for generating capacity lost in the destruction by rock slide of its Schoellkopf Hydroelectric Plant in 1956. PASNY contracted to sell 81.6 MW to New York municipals and rural electric cooperatives, and 250 MW to investor-owned utilities under 30-year contracts on a withdrawable basis. (Exh. 52) In addition to the withdrawable power, PASNY contracted to sell to in-state investor-owned utilities 600 MW of firm power and 200 MW of peaking power. No states requested an allocation, and PASNY contracted to sell 180 MW of power intended for eventual allocation out-of-state to investor-owned utilities in New York State on a withdrawable basis.[4]

On October 31, 1960, the Public Service Commission of Vermont (Vermont) became the first out-of-state entity to apply for a share of Niagara power. Vermont asked to reserve for its own growing needs the 180 MW of power reserved to out-of-state entities. PASNY rejected that re-

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[4] As noted in Opinion No. 151, *infra* (*mimeo.*, p. 18, n. 14), PASNY had not at the time of its initial allocation determined how much power to allocate to out-of-state preference customers. This 180 MW reserved for out-of-state allocation represented approximately 10 percent of the firm generating capacity of the project.

quest, and agreed instead to sell 50,000 KW of firm power to Vermont beginning January 1, 1962.

In 1966, PASNY agreed to sell 100 MW of firm power to Allegheny Electric Cooperative, Inc. (Allegheny). Thus, at that time, 150,000 KW had been committed to out-of-state entities. PASNY reserved the remaining 30 MW of power earmarked for marketing to out-of-state entities for possible sale to customers in the State of Ohio. Due to Ohio's inability to resolve wheeling difficulties, however, PASNY, after accepting applications from Vermont and Allegheny and holding evidentiary hearings thereon, awarded the 30 MW of power to Allegheny in 1974. (Exh. 98, p. 6)

In response to the allocation to Allegheny, Vermont filed a complaint with the FPC where it asserted that PASNY should have allocated more power overall out-of-state and the additional 30 MW should have been awarded to Vermont. In an initial decision issued May 15, 1975 and affirmed by the FPC on March 12, 1976, styled *State of Vermont Public Service Board* v. *Power Authority of the State of New York,* 55 FPC 1109, the FPC, *inter alia,* approved the allocation to Allegheny, but ruled that PASNY must make a reasonable portion (up to 10 percent of all types of project power) available out-of-state. The 30 MW of additional firm power awarded to Allegheny was subject to an agreement between Allegheny and American Municipal Power-Ohio (AMP-Ohio) that Allegheny would relinguish to AMP-Ohio all but 7,216 KW of that allocation when AMP-Ohio was able to negotiate the necessary transmission and wheeling arrangements. (55 FPC at 1112)

By 1976, Vermont, Allegheny, and Massachusetts Municipal Wholesale Electric Cooperative (MMWEC) expressed interest in continuing or commencing receipt of Niagara power. PASNY issued data questionnaires and applications to these parties, and further invited the gov-

ernors of Connecticut, New Jersey, Ohio, and Massachusetts to apply for an allocation of power. PASNY ultimately received applications from Vermont, Allegheny, MMWEC, AMP-Ohio, Connecticut Municipal Electric Energy Cooperative (CMEEC), and the Borough of Lansdale, Pennsylvania (Lansdale).

After receiving responses to questionnaires and supplementary data, on August 11, 1977, the PASNY staff and management held an informal conference with the applicants. Subsequently, the staff negotiated contracts providing for receipt by Vermont of 10 MW of peaking power and 40 MW of firm power and by Allegheny of 110 MW of firm power and 20 MW of peaking power. The staff submitted a "Memorandum to the General Manager from the Director of Power Operations" dated September 16, 1977 which set forth the history of out-of-state power allocations and an analysis of the various applications. The staff recommended approval of an allocation consistent with the contracts negotiated with Vermont and Allegheny.

On September 21, 1977, the PASNY Trustees, in reliance on its staff recommendation, decided to advertise the contracts for a public hearing. At that hearing held on October 25, 1977, representatives of Allegheny, Vermont, and AMP-Ohio supported the proposed contracts, and Lansdale, CMEEC, and MMWEC opposed them. On November 22, 1977, the Trustees issued a formal decision approving the proposed contracts.

On December 6, 1977, PASNY submitted the decision, the hearing record, and the recommendation to the Governor of New York. The Governor disapproved the contracts and directed PASNY to reconsider the question of what constitutes a reasonable amount of out-of-state power. It was made clear that the disapproval of the contracts resulted from Pennsylvania's newly-enacted gross receipts tax on electricity which fell on New York utilities.

After agreeing on February 9, 1978, to continue to provide power to Allegheny despite the imminent expiration of its contract, PASNY held another public hearing on April 26, 1978, on the question of how much power should be sold out-of-state. The same groups appeared at that hearing. All of the out-of-state applicants requested that at least 20 percent of the 50 percent preference power be sold out-of-state while the New York State Energy Office suggested reduction of the existing out-of-state power allocation.

A memorandum dated June 13, 1978, from the general manager to the PASNY Chairman summarized various considerations related to questions of how much, to whom, and at what rate power should be sold out-of-state. PASNY advertised and held hearings on proposed contracts with Vermont, AMP-Ohio, and Allegheny, a process that spanned the period from June 1979 until December 1979. The Trustees approved the proposed contracts following the hearing. These newly modified contracts reflected the substitution of a portion of firm power with peaking power. Vermont was to receive 40 MW of firm and 10 MW of peaking power. Allegheny was to receive 105 MW of firm and 25 MW of peaking power until AMP-Ohio completed wheeling arrangements to accommodate 19 MW of firm power and 4 MW of peaking power. At that time, Allegheny would be reduced to 86 MW of firm power and 21 MW of peaking power. This in fact occurred on June 1, 1980. (Exh. 98)

All three contracts were approved by the Governor on January 11, 1980, and by their terms, expire on June 30, 1985. Since the time the contracts were entered into, energy removed from the out-of-state allocation has been provided to the Metropolitan Transportation Authority of the State of New York (MTA), which provides mass transit services to the people in the New York City metropolitan area. PASNY allocated this energy to the MTA in purported furtherance of state energy policy mandates to en-

courage the use of mass transit facilities to conserve energy.

On October 22, 1980, Judge Birchman issued his initial decision in *Municipal Electric Utilities Association of the State of New York* v. *Power Authority of the State of New York*, Docket No. EL78-24 (Phase 1). The complainants in that proceeding challenged PASNY's allocation of power to in-state preference customers in 1960 and 1961. The complainants asserted that PASNY had failed to develop an estimate of the preference customers' reasonably foreseeable needs, and had not sold power sufficient to meet those needs to non-preference customers on a withdrawable basis, in contravention of PASNY's duties under the NRA. Judge Birchman held thusly (I.D., *mimeo.*, p. 3):

> This initial decision finds and concludes that complainants have established that PASNY's compliance with P.L. 85-159 and the project license is unclear, and that PASNY has not shown that it provided for the reasonably foreseeable needs of preference customers at a time when it entered into contracts with non-preference customers and over the lives of those contracts.

He further determined that the contracts that resulted from PASNY's failure to comply with the requirements of the NRA were void, and he ordered them to be reformed to comply with the in-state preference provision. (*Mimeo.*, p. 62) To that end, he ordered the execution of new contracts with non-preference customers, to expire in 1985, preceded by an inquiry into the reasonably foreseeable needs of the preference customers. (*Id.*) He stated that, to provide relief for preference customers, PASNY must allocate an amount of all types of project power to those customers to meet their reasonably foreseeable needs, including the needs of their commercial and industrial customers. Judge Birchman defined preference customers as "distributing agencies of project power such as in-state

municipal systems and non-profit cooperatives, and . . . not . . . the Metropolitan Transit Authority." (*Mimeo.*, p. 3).

On October 13, 1982, the Commission reviewed Judge Birchman's decision in Opinion No. 151, its "Declaratory Opinion and Order Affirming With Modifications Initial Decision on Niagara Preference." Following an exhaustive review of the history of the NRA and the Niagara Project, the Commission affirmed Judge Birchman in substantial part. The Commission determined that its role in that complaint proceeding was to decide (*mimeo.*, p. 45):

> not the policy issue of whether it is factually or politically wise to allocate Niagara hydropower preferentially to public bodies and nonprofit cooperatives, but the mixed question of law and fact of whether PASNY's 1960 segregation of 325 MW of preference power underlying its 1961 sale of the power, and any related arrangements for the withdrawal of preference power, were sufficient "to meet the reasonably foreseeable needs of the preference customers".

This role, the Commission stated, as created by the interplay of the NRA and the Federal Power Act (FPA), involved interpretation and enforcement of the terms of PASNY's license to operate the Niagara Project, and extended to "declaring any nonconforming contractual provisions . . . void and unenforceable, and . . . requiring the substitution of other provisions that will conform to . . . the license." (*Mimeo.*, p. 46)

Opinion No. 151 described the statutory scheme created by Congress in th NRA as follows (*Mimeo.*, pp. 46-49):

> Congress devised a flexible marketing plan consisting of a statement of policy to guide PASNY in the administration of the plan through the years, and certain vehicles to implement the policy. The statement

of policy is embodied in Subsection 1(b)(1) of the NEA and Article 20 of PASNY's license,

> to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use. . . .

Congress said therein that *the people, as consumers of electric power,* and particularly domestic and rural consumers, are to be the primary beneficiaries of at least one-half of the hydropower developed at Niagara Falls. . . .

Congress selected two vehicles for implementing the statement of policy. First, in Subsection 1(b)(1), Congress designated exactly 50 per cent of the project power as preference power and directed PASNY, in disposing of that power, to "give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance" of the Niagara Project. . . . [S]uch an abundant supply of preference power would enable the public bodies and nonprofit cooperatives to engage in "yardstick competition" with utility companies organized and administered for profit. Their presence, and the availability of preference power for public bodies and nonprofit cooperatives that might be organized, would likely have a moderating influence on the electric power rates of profit-oriented utilities.

Congress knew, however,that a substantial part of the preference power would not then be resold by the public bodies and nonprofit cooperatives to domestic and rural consumers. . . . As a result, Congress se-

lected a second vehicle for implementing the statement of policy by directing PASNY in Subsection 1(b)(5) to provide for resale rates for all of the hydropower (preference and non-preference power alike) that would be consistent with the statement of policy in Subsection 1(b)(1).

. . .

To the extent that the 50 per cent of project power designated as preference power is not resold to domestic and rural consumers, part of the 50 per cent of project power designated as non-preference power must be resold to domestic and rural consumers, and vice versa, to the end that the total amount of preference and non-preference power that is resold to domestic and rural consumers will be *at least 50 per cent of the project power.* [Emphasis in original]

The Commission further determined in Opinion No. 151 that Congress intended the term "public bodies" in the NRA to include only "those governmental entities that resell and distribute the preference power to the people as consumers of such power." (*Mimeo.*, p. 52) Further, the Commission reviewed and revised PASNY's list of "preference customers", for which customers' reasonably foreseeable needs PASNY should have reserved preference power. (*Mimeo.*, pp. 54-61) The Commission also determined that, to create the yardstick competition which Congress intended in the preference provision, PASNY was required to serve the industrial and commercial, as well as rural and domestic, loads of its preference customers. (*Mimeo.*, pp. 61-64) The Commission found that PASNY failed to make sufficient "flexible arrangements" (*mimeo.*, pp. 65-66) to meet the "reasonably foreseeable needs" (*mimeo.*, 66-76) of its preference customers.

Lastly, the Commission determined that, because PASNY failed to market power sufficient to meet the reasonably foreseeable needs of its preference customers on

a withdrawable basis, "the resulting shortfall can be remedied by holding PASNY to its alternative obligation to provide for withdrawal of all of the preference power." (*Mimeo.*, p. 77) The Commission held as void PASNY's contracts with non-preference entities to the extent that the contracts limited the withdrawal of preference power to less than 50 per cent of the project power. (*Id.*) The Commission determined to leave to PASNY the responsibility to negotiate reformations of the contracts to conform to the Commission's decision, subject to the Commission's further review.

By order issued November 30, 1982, the Commission granted rehearing for purposes of further consideration and issued a temporary stay of Opinion No. 151.[5]

PROCEDURAL BACKGROUND OF THE INSTANT PROCEEDING

On March 4, 1980, MMWEC filed a complaint and motion for partial summary judgment requesting that this Commission, pursuant to its authority under the NRA and the license issued to PASNY, modify the 1980 out-of-state allocations of Niagara Project power made by PASNY. MMWEC alleged that it should have received an allocation of Niagara power, and that all out-of-state allocations of Niagara Project power should total at least ten percent of the project's capability. On March 27, 1980, an identical complaint was filed by CMEEC. By notice dated September 10, 1980, the Commission consolidated the proceedings.[6]

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[5] The Commission's order staying Opinion No. 151 effectively precludes the Presiding Judge from disposing of the motion filed by MMWEC and CMEEC jointly on October 20, 1982, for severance of the discrete "MTA" issue and for appropriate relief.

[6] The original intervenors were: Allegheny, Vermont, the City of Cleveland, Consolidated Edison Company, the Municipal Electric Utilities Association of New York (MEUA), New York State Electric &

In its order on the complaints issued February 13, 1981, (February Order) (14 FERC ¶61,128), the Commission provided for a hearing centered on the following general issues:

1. Whether CMEEC and MMWEC should receive allocations and if so, in what amount;

2. What is a reasonable amount of Niagara Project power up to ten percent to be allocated out-of-state;

3. The issue of in-state preference needs as tied to out-of-state preference allocations; and

4. The possible linkage of St. Lawrence Project No. 2000 allocations with Niagara Project allocations.

The Commission made certain preliminary findings in its February Order. It found under the authority of *Vermont* that Massachusetts and Connecticut are neighboring states within economic transmission distance, within the meaning of the NRA. (14 FERC ¶61,128, p. 61,232) Also under the *Vermont* case, the Commission found that the NRA does not require PASNY to allocate a full 10 percent of Niagara power to out-of-state preference customers, but only a reasonable amount up to 10 percent. (*Id.*) Further, the Commission "specifically reject[ed] PASNY's contention that PASNY's discretion in allocating power to out-of-state preference customers is not subject to Commission review." (*Id.*) Finally, the Commission rejected New York State Electric and Gas Company's (NYSEG's) argument that the Commission lacked jurisdiction to affect or abrogate NYSEG's contract with PASNY. The Commission in its above-cited order stated (14 FERC ¶61,128, p. 61,233):

Gas Corporation and the New York State Energy Office. During the course of the proceeding, late interventions were sought by and granted to Rochester Gas and Electric Company, a group of investor-owned utilities in Massachusetts, MTA and AMP-Ohio.

> The Niagara Act gives authority to the Commission, in the event of disagreement, to determine and fix the portion of power to be made available to the out-of-state preference entities and leaves, at least in the first instance, to PASNY the responsibility for accommodating the Commission's determination.

The Commission clarified its February Order in its order issued March 4, 1982, 18 FERC ¶61,217 (March Order) which answered in the affirmative the question of whether evidence should be presented regarding Niagara Project capacity, and reaffirmed that "out-of-state entitles are not always entitled, as a matter of law, to allocations aggregating a full ten percent of project power." (*Id.* at p. 61,440) By stipulation among the parties, the issue of Niagara Project capacity was dropped and the figures developed in *Vermont* were adopted. (Tr. 230-49)

By motion filed October 22, 1981, Vermont sought to dismiss MMWEC's complaint for lack of standing. In its March Order, *supra*, the Commission denied that motion, finding that, "Although it is not clear whether MMWEC was duly authorized to act as an agent for (the Massachusetts Department of Public Utilities) at the time it filed its complaint, it appears that it now has that authority." Vermont's application for rehearing of this order was denied by operation of law on March 5, 1982.

A motion by the Municipal Electric Utilities Association of New York State (MEUA) to limit the participation of Vermont for lack of standing on the ground that Vermont does not qualify as a preference customer was denied by order of the Presiding Judge issued January 21, 1982. The Presiding Judge found that whether Vermont sought more power than it had contracted for and whether it legally qualifies as a preference customer were questions to be addressed at these hearings.

Following prehearing conferences, extensive discovery procedures were undertaken; prepared testimony was filed

and hearings were held commencing on April 13, 1982, and continuing through May 12, 1982. The record consists of 3805 pages of transcript, 259 offered exhibits, and numerous items by reference. Initial briefs were filed on July 23, 1982, and reply briefs on August 30, 1982. To provide a further opportunity to respond to the arguments raised by the various parties and to permit the parties to address the impact of the Commission's Opinion No. 151 on issues in this proceeding (issued October 13, 1982), third and fourth round briefs were filed on November 12 and December 7, 1982, respectively.[7]

PREVIOUSLY RESOLVED LEGAL ISSUES

The Commission, in previous determinations involving disputes as to allocation of Niagara Project power, has made findings of law that are binding on th Presiding Judge in these proceedings, notwithstanding the parties' attempts to relitigate the issues underlying these findings. An enumeration of issues that the Commission has already resolved demonstrates that the complexity of this case does not extend quite as far as the parties' briefs may indicate. Following is a listing of the Commission's rulings which are found to be controlling here. However, as noted above, the Commission has issued a temporary stay of Opinion No. 151 pending reconsideration on petitions for rehearing. Therefore, reference below to Commission views expressed in Opinion No. 151 is not for the purpose of citing a supporting precedent. Rather, it is for the purpose of discerning to what extent, if any, the Commission has indicated a willingness to depart from precepts pronounced in *Vermont* and in the procedural orders issued in the instant proceeding.

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[7] By order issued September 27, 1982, the Presiding Judge denied the petition to intervene and motion for leave to file a memorandum of law as *amici curiae* filed by the American Public Power Association and the National Rural Electric Cooperative Association on August 30, 1982.

1. Vermont, Connecticut, Massachusetts, Ohio, and Pennsylvania are all "neighboring states within economic transmission distance."

In *Vermont,* the FPC addressed issues raised in a complaint proceeding in which Vermont contested PASNY's allocation of 30 MW of project power to Allegheny. In ruling on the complaint, the FPC confronted the issue of whether Pennsylvania and Ohio are the only neighboring states, within the meaning of the NRA, to which PASNY may properly allocate project power. The FPC held as follows (55 FPC at 1113):

> In view of the fact that the literal language of the Act is not restrictive of the term "neighboring states", that the legislative history clearly favors no particular state(s), and that the Act requires the power to be made available "in such manner as to encourage the widest possible use," we agree with the Administrative Law Judge that we should follow the plain meaning of the language. This clearly would include Vermont as a neighboring state of New York. Furthermore, we note that Congress could have specifically designated Ohio and Pennsylvania in the Act as sole recipients of Niagara power, but did not do so. [Footnotes omitted]

The Commission reaffirmed this holding in its February Order in this proceeding. There, the Commission confirmed that the NRA did not limit out-of-state allocations to Ohio and Pennsylvania. (14 FERC ¶61,128 at p. 61,232)

It is thus clear from the Commission's rulings in the above-cited cases that the term "neighboring states" under the NRA at least encompasses the states of Vermont, Connecticut, and Massachusetts, as well as Ohio and Pennsylvania.[8]

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[8] This ruling was re-affirmed by the Commission in its March Order, 18 FERC ¶61,217, p. 61440.

2. The NRA does not, as a matter of law, require PASNY to allocate a full 10 percent of project power to out-of-state entities.

In *Vermont* the FPC determined that the NRA does not require allocation of a full 10 percent of project power to out-of-state users. The FPC unequivocally stated that "the [NRA] does not require PASNY to sell 10 percent of project power to out-of-state preference customers, but only that PASNY make a reasonable portion of project power - up to 10 percent - available to those customers." (55 FPC at 1120) The Commission, in its February Order issued in the instant proceeding, reaffirmed that ruling, finding that "[n]othing in the complainants' pleadings sets forth anything new to change our decision on this issue." (14 FERC ¶61,128, p. 61,232) In Opinion No. 151, the Commission approached the issue from the perspective of the in-state preference customers and confirmed that "80 percent appears to be the *minimum* rather than maximum percentage of preference power required for preference customers within New York." (*Mimeo.*, p. 35, n. 39)[9] Thus, the Commission has made clear its conclusion that the NRA does not, as a matter of law, mandate allocation of a full 10 percent of project power to out-of-state entities.

3. All types of project power are subject to the preference provisions of the NRA.

The FPC, in *Vermont,* affirmed the Administrative Law Judge's finding that "project power under the [NRA] was not limited to firm power, but included all of the various categories of power marketed by PASNY from the Niagara project . . ." (55 FPC at 1118). The outcome of the instant proceeding, therefore, is bound by this determination that project power subject to the preference provisions of the NRA is not limited to firm power.

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[9] *See also* the Commission's March Order in these proceedings, 18 FERC ¶61,217, p. 61,440.

4. The Commission has the authority to abrogate existing contracts in fulfillment of its duties under the NRA.

Certain parties to the instant proceedings have sought to establish the principle that the Commission cannot alter or abrogate existing contracts between PASNY and its present customers. The Commission summarily rejected that contention in its February Order in which the Commission ruled that (14 FERC ¶61,128, p. 61,233):

> Under the clear terms of the Niagara Act, the Commission is granted jurisdiction to resolve disputes between applicants in neighboring states and PASNY over allocation of Niagara Project preference power. Whether or not NYSEG's contract must be reformed is a question not now before the Commission. The fact that the Commission has jurisdiction to require PASNY to allocate Niagara Project preference power in accordance with the Niagara Act cannot be denied. No contracts already in existence among the parties in this proceeding can in any way oust the Commission of its authority to resolve the dispute before us.

In Opinion No. 151, the Commission provided another ground to support its assertion of the authority to declare contract provisions void and unenforceable. There, the Commission found that its authority under the Federal Power Act (FPA) to interpret and enforce the terms and conditions in PASNY's license included the authority to void contract provisions not in conformity with the NRA's preference provisions which, as noted *supra,* are incorporated *verbatim* into PASNY's license. (*Mimeo.,* pp. 45-46) The Commission's authority to void or modify contract provisions not in conformity with the preference provisions of the NRA therefore derives from both the NRA and FPA.

Thus, in resolving the dispute as to the out-of-state allocation of Niagara power, the Commission's disposition in

the present proceedings is not limited by existing contractual arrangements.

5. The Commission can review PASNY's allocation decision de novo, and need not defer to PASNY's discretion in its out-of-state allocations.

The Commission's specific statements in its February Order in this proceeding and in Opinion No. 151, coupled with the inferences to be drawn from *Vermont,* lead inexorably to the conclusion that the Commission has ruled on the scope of review to be accorded to PASNY's allocation decision. The Commission has determined that the NRA requires nothing less than *de novo* review of PASNY's out-of-state allocation, and stated as much in its February Order (14 FERC ¶61,128, p. 61,232-33):

> [W]e specifically reject PASNY's contention that PASNY's discretion in allocating power to out-of-state preference customers is not subject to Commission review. . . . By the very terms of the Niagara Act and the Niagara Project license, the Commission is granted the power to resolve disputes between the Licensee and any states concerning the allocation of Niagara Project power.

In addition to the above-cited, very specific rejection of PASNY's argument that its out-of-state allocations are discretionary and thus non-reviewable, the Commission expressly directed the Presiding Judge to supervise the making of a complete record upon which a decision on allocations could be based (*id.* at p. 61,232):

> What constitutes a reasonable amount [of power] is an issue that can only be addressed upon examination of all relevant circumstances in an evidentiary hearing. . . . The Presiding Judge shall take evidence to determine the proper allocation of firm and other project power to be made to out-of-state preference entities.

The Commission's statements in its February Order leave no room for argument as to what the Commission's role is in this complaint proceeding. The Commission will discharge its obligation under the NRA "after public hearings, [to] determine and fix the applicable portions of power to be made available [out-of-state] . . ."[10] by compiling a complete record in the instant proceeding and rendering a decision thereon. The only instance in which the Commission may defer to PASNY's discretion is in conceding to PASNY "in the first instance. . . the responsibility for accommodating the Commission's determination." (14 FERC ¶61,128, p. 61,233)

This view of the Commission's responsibilities under the NRA is consistent with its expressions in *Vermont*. There, as in the instant proceeding, the complainants, pursuant to 16 U.S.C. § 836(b)(2) of the NRA, protested PASNY's out-of-state allocations. The FPC afforded *de novo* review to the allocation in question, and on the issue of what deference to accord to PASNY's decision, stated (55 FPC at 1117):

> It is difficult. . . to give much weight to PASNY's decision favoring Allegheny because there is nothing in the record to show that PASNY had any more evidence to consider than exists in the record before us. Furthermore, the decision by PASNY's Board of Trustees fails to enumerate the basis for that decision. Thus we conclude that, although we can consider PASNY's original decision, it is not helpful to us.

Furthermore, as the Commission iterated in Opinion No. 151, the Commission has the authority under the FPA to interpret *and enforce* the terms of PASNY's license. (*Mimeo.*, p. 45) That authority necessarily includes the authorization to take evidence and render a decision upon

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[10] 16 USC § 836(b)(2).

the question of whether PASNY has complied with its license. Thus, on the basis of the FPA as well, the inquiry in this proceeding must take the form of *de novo* review.[11]

It is therefore clear that the Commission is free to defer or not to PASNY's decision, and can make its own decision on the basis of the record before it. All arguments to the effect that the Commission is limited to something less than *de novo* review must be, and are therefore, rejected.

6. MMWEC is now Massachusetts' designated bargaining agent and has standing to seek an allocation of Niagara power on that state's behalf.

In its March Order in the instant proceeding the Commission denied a motion by Vermont to dismiss MMWEC's complaint for lack of standing. The NRA requires that if a state has designated a bargaining agent for the procurement of Niagara power, PASNY must deal with only that agent in that state. (18 USC § 836(b)(2)) Vermont had argued that MMWEC lacked standing because it was not the designated bargaining agent for the Commonwealth of Massachusetts, and thus MMWEC was not authorized to seek an allocation of power from PASNY for that state. The Commission responded that (18 FERC ¶61,217, p. 61,440):

> Although it is not clear whether MMWEC was duly authorized to act as an agent for DPU [Department of Public Utilities] at the time it filed its complaint, it appears that it now has that authority. The October 30, 1981, letter from the Chairman of the DPU to

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[11] The Commission reiterated its rejection of any manner of review other than *de novo* in its March Order issued in these proceedings (18 FERC ¶61,217, p. 61,440):

> The plain language of the statute clearly specifies not only that PASNY's calculation of a "reasonable portion" is reviewable but also that the Commission may determine *de novo* the amount of power to be made available to neighboring States.

> the general manager of MMWEC ... authorizes MMWEC to act as the bargaining agent for the Commonwealth of Massachusetts in this proceeding.

Thus, the status of MMWEC as a proper party to seek an allocation of power for Massachusetts is not open to question.

7. Vermont is eligible for a portion of the out-of-state allocation.

A much-litigated point in this proceeding is the question of whether Vermont is properly a recipient of preference power under the NRA. Vermont's situation differs markedly from those of the other present and potential recipients of Niagara power. AMP-Ohio, MMWEC, and CMEEC are organizations whose members are municipal electric distribution systems. Allegheny is a rural electric generation and transmission cooperative whose members receive and distribute power on a non-profit basis. The complainants, with AMP-Ohio and Allegheny, have demonstrated by exposition of the legislative history of the NRA that the entities to which they distribute Niagara power fit into the definition of "public bodies and non-profit cooperatives" for which a preference in the allocation of power was established in the NRA, as that definition was refined in the Opinion No. 151. Thus, no valid dispute exists as to their eligibility for allocations of Niagara power.

However, the application of the preference provisions of the NRA to Vermont is less clear. The Vermont Public Service Board purchases power from PASNY and subsequently re-sells the power to both publicly-owned and privately-owned utilities in the state. (Tr. 2619-20) The benefits of the relatively low-cost Niagara power are passed through to the utilities' (both publicly-owned and privately-owned) residential customers by means of lower-cost power. (Tr. 2687-88) The controversy as to Vermont's status centers around the fact that Vermont distributes its Niagara

power to consumers by means of sales to both investor-owned and consumer-owned utilities.

Resolution here of the issue as to Vermont's preference status is overwhelmingly prejudiced by the FPC's decision in *Vermont*. In that proceeding, the FPC confronted facts and legislation identical to those in the present proceeding. Fully cognizant of Vermont's manner of distribution of the Niagara power through investor-owned utilities, the FPC nevertheless stated (55 FPC at 1113):

> [W]ith respect to Vermont's eligibility to receive this power, the Act directs PASNY in disposing of half of the project power to "give preference and priority to public bodies and non-profit co-operatives." Allegheny admits PSB [of Vermont] is a public body but then argues that PSB should not receive power as preference customer because it sells approximately 80 percent of its Niagara power at wholesale to non-preference customers. Allegheny further disputes PSB's showing that PSB prevents, through its regulatory powers, utility companies from making a profit on Niagara power. Allegheny simply states it is not convinced PSB ensures that all the benefits of Niagara power flow to the consumers. The Act does not preclude distribution of Niagara power through investor-owned utilities to those intended to be benefited. The Administrative Law Judge found that there exists ample support in the record that the ultimate consumer in Vermont is benefited through rate reduction. We believe he was correct and that Allegheny's argument is strained and unpersuasive in view of the plain reading of the Act and PSB's rate reduction technique. [Footnote omitted]

In light of *Vermont*, and in the absence of any change in the factual circumstances, it is necessary to concede that

the Commission has confronted and resolved in Vermont's favor the issue of whether it is a proper preference customer.

Certain parties have argued, on various grounds, that *Vermont* in no way binds the Presiding Judge in the instant proceeding. They have asserted that the above-cited passage in *Vermont* is mere *dicta;* that the principles of *stare decisis, res judicata,* and collateral estoppel do not or should not apply; and that the Commission did not have the full exposition of the preference clause issue in *Vermont* that has been provided in the present proceeding. These arguments notwithstanding, the parties have presented no rationale for disregarding the FPC's previous determination as to Vermont's eligibility to receive preference power. The FPC ruled on facts identical to those presented in the instant proceedings; no change whatsoever has occurred in Vermont's manner of distribution of Niagara power. The Presiding Judge is not free to disregard the Commission's ruling in *Vermont* absent a showing of changed circumstances.[12]

These parties further argue that the Commission in Opinion No. 151 construed the NRA in a manner inconsistent with the construction embraced by the FPC in *Vermont.* They point out that in Opinion No. 151 the Commission refined the definition of preference customers, which the NRA designates as "public bodies and non-profit cooperatives", by resolving that only "those governmental entities that resell and distribute the preference power to the people as consumers of such power" are validly public bodies for the purpose of qualifying under the preference clause. (*Mimeo.,* p. 52) These parties claim that, under this definition Vermont can no longer claim preference status

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[12] *Delmarva Power & Light Co.,* Docket No. ER82-751, Order issued October 29, 1982 (21 FERC ¶61,050).

because Vermont is in no sense a distributor of power at the retail level, as required by Opinion No. 151; rather, it is a broker selling power at wholesale to investor-owned utilities, as well as municipals and cooperatives. Further, they point out, Vermont cannot be a distributor because it does not own its own distribution system. It acts as a conduit for Niagara power by selling the power to other companies for distribution to consumers.

These parties highlight as well that, in Opinion No. 151, the Commission determined that one purpose of the NRA preference provision was to foster yardstick competition between publicly-owned and privately-owned distribution systems. The achievement of yardstick competition would occur by means of the purchase of inexpensive Niagara power by consumer-owned power companies, *i.e.*, municipal systems and rural cooperatives, who would compete with privately-owned companies in sales of power to consumers. The low rates charged by the consumer-owned companies would operate as a yardstick and force the privately-owned companies to maintain the lowest possible rates. Opinion No. 151 found yardstick competition to be a goal of the NRA in the course of its determination that preference entities were entitled to receive power for the industrial and commercial, as well as rural and domestic, needs of their customers.

These parties assert that, to accomplish the legislative purpose of encouraging yardstick competition between consumer-owned and privately-owned companies, the Commission must permit the sale of preference power only to publicly-owned distribution systems selling at retail, because it is these latter distributors, and not the State Public Service Board, who engage in retail sales and are the intended participants in yardstick competition. If privately-owned companies as well as publicly-owned companies receive preference power and resell it to consumers, the desired effects of yardstick competition, as described above, are not achieved. In their view, Vermont cannot

validly claim the status of a preference customer. Vermont is properly considered a bargaining agent in their theory of the operation of the preference clause.

Upon review of these arguments, the Presiding Judge has concluded that Opinion No. 151, assuming *arguendo* that it is not modified on rehearing, does not require any departure here of the finding in *Vermont* that Vermont is a proper preference customer. This conclusion is based on a number of factors, most prominent among which is that the Commission nowhere in Opinion No. 151 explicitly overruled or in any way criticized *Vermont*. Importantly, the Commission acknowledged in orders leading to the hearing which culminated in Opinion No. 151 that the issue of Vermont's status had been resolved in *Vermont* and was not open to further litigation.[13] Thus, the Presiding Judge has discerned no express Commission intent to undo the findings in *Vermont* in Opinion No. 151.

Furthermore, the marked difference in the factual settings of Opinion No. 151 and the present proceeding renders inappropriate a slavish adherence to the underpinnings of Opinion No. 151. Opinion No. 151 resolved issues as to the in-state allocation of Niagara power. Concededly, it included an interpretation of the preference clause which is applicable to out-of-state allocations a well, by virtue of 16 USC § 836(b)(1). However, to the extent, if any, that Opinion No. 151 is inconsistent with *Vermont*, the Presiding Judge is bound by *Vermont*, (1) in view of the fact that *Vermont* was geared specifically to out-of-state allocations, and (2) in the absence of any indication by the Commission that *Vermont* is to be ignored.

This is not to infer, however, that Opinion No. 151, when viewed as a whole, in anyway requires a different resolution of the issue of Vermont's preference status than

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[13] *MEUA* v. *PASNY*, Docket No. EL78-24, Order issued November 2, 1979.

did *Vermont*. Just as Opinion No. 151 nowhere explicitly overruled *Vermont*, that opinion does not overrule by inference. Arguments to the effect that Vermont does not qualify for preference power because it is not a distribution company are not persuasive. The determination in Opinion No. 151 that a public body must be involved in a distribution function was used there to terminate MTA's status as a preference customer, because MTA is a consumer of the Niagara power it receives. MTA's non-distribution status is simply not analogous to Vermont's situation, in view of the fact that Vermont does not consume any of the energy it receives but rather resells that power to publicly-owned and privately-owned companies for ultimate sale to consumers. In fact, Opinion No. 151 seemingly endorses the preference status of an in-state public body, New York City, who will distribute the power *via* an investor-owned utility, Consolidated Edison of New York.[14]

As to the question of yardstick competition, it is difficult to disagree with the conclusion that the purchase by Vermont of preference power and the subsequent resale to consumers *via* both publicly-owned and privately-owned power systems renders impossible the achievement of yardstick competition. Clearly, if all Vermont companies have access to inexpensive Niagara power none will act as a moderating influence on the rates of any of the others. Vermont's particular manner of distributing power thwarts the attainment of yardstick competition. The absence of a potential for yardstick competition in Vermont caused by Vermont's distribution of power through investor-owned utilities as well as municipals and cooperatives, however, does not require a rejection of Vermont on that basis. Given the relatively small amount of power allocable to out-of-state entities, it is indeed easy to accept the fact that yardstick competition can play, at most, a minimal part in the out-of-state allocations.

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[14] Opinion No. 151, *mimeo.*, p. 52, n. 63.

Furthermore, if the Presiding Judge were to find that the goal of attaining yardstick competition was the controlling principle in the establishment of out-of-state allocations and on that basis concluded that only Vermont's publicly-owned systems of the NRA would be subverted. Power currently distributed to Vermont's domestic and rural consumers *via* investor-owned utilities would be reallocated to publicly-owned systems both in Vermont and in the neighboring states.[15] These publicly-owned systems would sell the inexpensive Niagara power to *all* of their customers because, as the Commission noted in Opinion No. 151 (*mimeo.*, pp. 61-64), if the goal of yardstick competition is to be achieved, the publicly-owned systems must serve the full needs of their customers.[16] The bulk of the complainants' (MMWEC and CMEEC) load is industrial and commercial. (Exh. 100) Thus, the result of a shift of Niagara power from the domestic and rural users in Vermont served by investor-owned utilities to publicly-owned systems elsewhere would inure to the benefit of industrial and commercial users. (*See* definition of "domestic and rural" consumers adopted herein, *infra* at 59)

Although this result would pay appropriate homage to the goal of yardstick competition by confining sales of preference power to publicly-owned systems, it more importantly would fly in the face of the express intent of Congress in the NRA, which is to assure that preference power is used to benefit consumers, particularly domestic and rural consumers. (18 USC § 836(h)(1)). Opinion No. 151 concedes that yardstick competition is a "vehicle" se-

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[15] Some of this power could possibly go to New York, depending on the allocation method adopted.

[16] Even with the allocation methodology endorsed *infra*, the Commission does not have control over the delivery of that power by publicly-owned systems to their individual customers, and thus cannot assure that only rural and domestic users receive the benefits of Niagara power.

lected by Congress to assure the accomplishment of the express goal that *"the people, as consumers of electric power,* and particularly domestic and rural consumers, are to be the primary beneficiaries" of preference power. (*Mimeo.,* p. 47) This "vehicle" cannot, however, be elevated above the express Congressional purpose. The FPC in *Vermont* based its acceptance of Vermont's eligibility to receive preference power on this very point, that Vermont's manner of distribution assures that domestic and rural consumers are the primary beneficiaries of Niagara power. That ruling endures and is embraced in Opinion No. 151. It is concluded, therefore, that the effort to establish yardstick competition does not provide a rationale for disturbing Vermont's method of distributing Niagara power.

Further, any effort to attain the goal of yardstick competition would inevitably result in a substantial hardship to Vermont's municipal and cooperative systems, who even the complainants concede are legitimate preference customers. Niagara powers is presently transported from the Vermont border to in-state utilities through the lines of investor-owned utilities, because the Vermont Public Service Board owns no facilities of its own. (Tr. 2609-10) If the investor-owned utilities' access to Niagara power were cut off, and if those utilities refused to transport the power, the consumer-owned companies would be forced to construct their own lines to transport the power, thereby increasing the cost of power ultimately delivered to preference customers.

Finally, the Presiding Judge takes note of the fact that Vermont has grown dependent on the Niagara power which it has received over the last 20 years. This does not imply, however, that Vermont has any vested legal or equitable right in a long-term continuity of receipt of Niagara power. Vermont's argument that it has provided economic support for the project from its inception and received Niagara power over an extended time, and thus is entitled to priority over later applicants has no basis in the NRA, and

indeed contravenes the directive in the NRA that the power "shall be made available . . . in such manner as to encourage the widest possible use . . ." (18 U.S.C. § 836(b)(1)). The NRA does not permit such "grandfathering in" of the existing recipients, and such recipients have no superior legal rights over late-comers. Therefore, the question of how much power Vermont is entitled to receive in the future is not resolved by either reference to the amount of power that it has received in the past or its alleged past economic contribution to the project. That question is resolved by the application of the allocation method adopted and discussed *infra* as well as the evidence on the issue of its capability to receive the power.

For the foregoing reasons, it is concluded that Vermont is a proper recipient of preference power.

8. The MTA is not a public body and thus is not entitled to an allocation of preference power.

In Opinion No. 151, the Commission confronted head-on the issue of whether the MTA is a public body entitled to an allocation of preference power. The Commission (*mimeo.*, pp. 49-54) reviewed the legislative history and determined that a public body must be a *distributor* or reseller, not a *user*, of power; thus, the Commission held, the MTA does not quality for the status of a public body.

As noted *supra*, the Commission issued an order granting rehearing for purposes of further consideration and granting stay of Opinion No. 151 on November 30, 1982. As a result, Opinion No. 151's conclusion as to MTA's preference status is not yet binding in the instant proceeding. However, based upon the Presiding Judge's independent review of the legislative history of the NRA, it is concluded that MTA is not eligible for receipt of preference power for the same reasons given by the Commission. *See* legislative history cited in Opinion No. 151, *mimeo*, pp. 49-54.

THE AMOUNT OF POWER TO BE MADE AVAILABLE OUT-OF-STATE

As noted earlier, the NRA specifies that 50 percent of the power generated by the Niagara Project is preference power, to be made available to preference customers in New York and in neighboring states. *See* Opinion No. 151, *mimeo.*, p. 80, where the Commission states that *"public bodies and nonprofit cooperatives are entitled by the NRA to satisfy their needs from 50 per cent of every classification of Niagara power and energy."* Thus, out of 2,480 MW of project power, which includes firm and diversity power (1,880 MW), peaking A power and peaking B power (400 MW), and nonfirm power (200 MW), the in-state and out-of-state preference customers are entitled to a total of 1,240 MW.[17] Of this total amount available to satisfy preference customer needs, 940 MW is firm power, representing one-half of the project's firm power output of 1880 MW.

The NRA further provides that, out of the amount reserved for the needs of preference customers, a reasonable amount, not exceeding 20 percent of the total preference power, is to be made available for use in neighboring states. Thus, out of 1,240 MW of total project power, 940 of which is firm power, the out-of-state entities may receive a maximum of 248 MW of all project power, with up to 188 MW of that latter amount being firm power. Conversely, the in-state preference customers may receive a minimum of 992 MW of all project power, at least 752 MW of which is firm power. The NRA directs the Commission to make a *de novo* determination of the amount

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[17] The amount of Niagara Project nonfirm capacity depends on the amount of Water available. Under the most adverse water conditions, 200 MW of nonfirm capacity is available. Nonfirm capacity is not sold under contract whereas firm and peaking capacity is. (Exh. 12, p. 5; Exh. 85, p. 5; Exh. 186, pp. 7-8; Exhs. 63-65, 86, 246)

that would constitute a reasonable allocation in the event of a dispute, as has occurred here.

The NRA gives no guidance as to what the ingredients of a reasonable amount are. Significantly, it does not state unequivocally that a reasonable amount is that amount that remains after the needs of the in-state preference customers are satisfied. Indeed, the NRA provides only a cap on the amount of power that may be allocated out-of-state. The record in this proceeding demonstrates, however, that it is not necessary to sift through the data offered by the in-state and out-of-state users to determine which among these two classes of competing users has made a showing adequate to justify an allocation of a particular amount. At the present time, PASNY has made only 406 MW of firm power available to serve the needs of in-state preference customers. This represents only 21.6 percent of the total firm project capacity, and is far below the 40 percent minimum to which in-state preference customers may be entitled. The power needs of these in-state preference customers will not reach the 40 percent, or 752 MW, level until the winter of 1986/87, based on PASNY's projections of peak demand. (Exh. 85, pp. 3-6; Exhs. 86, 87) The contracts of the current in-state and out-of-state recipients of Niagara power expire in 1985 and a new allocation will govern after that time. PASNY has already concluded hearings related to post-1985 allocations. Given these facts, in conjunction with the showing of an aggregate out-of-state preference market requirement in excess of 10 percent (Tr. 356-59), there is every justification for making available a maximum 10 percent of project power to out-of-state preference customers.

Furthermore, the latitude which the NRA allows to PASNY and the Commission in establishing the amount of power to be made available out-of-state should not be used to defeat the Congressional intent of that Act. Congress prescribed that 50 percent of the project power was to be allocated to preference customers. If the Commission

were to fail to direct PASNY to make available a full 10 percent of the project power to out-of-state preference customers, with the result that in-state non-preference customers received additional power, then the preference provision of the NRA would be turned on its head.

It is, therefore, concluded that the record fully supports a finding that PASNY be and is required to make available to out-of-state entities a full 10 percent of all types of project power. Whether each of the entities has the capability to avail itself of its allocable share will be discussed subsequently.

OUT-OF-STATE ALLOCATION METHODOLOGY, ENTITLEMENTS AND ALLOCATIONS

Having established that entities in Vermont, Pennsylvania, Ohio, Connecticut, and Massachusetts are eligible for an allocation of Niagara power, and that, on the basis of this record, those entities are entitled to an aggregate of 10 percent of all Niagara project power, we must now choose a method of apportioning that entitlement among those entities. In embarking upon the search for an apportioning methodology, it is important to bear in mind the breadth of the Commission's discretion in choosing among methods. The NRA prescribes no particular method of apportionment, giving rise to the assumption that the Commission, in light of its particular expertise in allocation of energy, has broad latitude in the exercise of its discretion.[18] Once a methodology is adopted, we will then proceed to a review of the record data applicable to that methodology in order to utilize, as nearly as possible, a consistent data base upon which will be calculated the power entitlement of each entity. Thereafter, an allocation determination will be made for each entity giving due consideration to any factual or equitable consideration reflected in this record.

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[18] *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581 (1945).

1. The Apportioning Methodology

There were four methods proposed to apportion the out-of-state preference power among the six entities: (1) total customer kilowatt hours (proposed by CMEEC witness Gabriel B. Stern); (2) residential kilowatt hours (proposed by MMWEC witness Bruce W. McKinnon); (3) number of residential customers (proposed by Staff witness Billie E. Biggerstaff); and (4) number of residential customers and levels of unemployment (proposed by AMP-Ohio witness Donald A. Murry).

Staff calculated the number of residential customers for each of the out-of-state entities, and derived entitlement factors as follows (Exh. 192):

Out-of-State Entities	Number of Residential Customers	Entitlement Factor (%)
CMEEC	47,100	6.72
MMWEC	255,361	36.42
Vermont	201,678	28.77
AMPP-Ohio (City of Cleveland only)	39,920	5.69
Allegheny	151,147	21.56
Lansdale	5,856	0.84
Total	701,062	100.00%

Thus, of the aggregate Niagara power and energy available to the six out-of-state entities, CMEEC would get 6.72 percent, MMWEC would get 36.42 percent, etc.

Similarly, for the same six entities, CMEEC derived entitlement factors based on the total customer load. It compiled its data by measuring the energy at the delivery point(s) of each entity, without any distinction as to the end use of that energy after distribution. It then divided each amount by the combined energy of the six entities to arrive at its entitlement factors. (Exh. 13)

On the other hand, MMWEC's proposed method of utilizing residential kilowatt hours did rely on an end usage distinction among customers' loads. The residential kilowatt hour usage of each entity, as compiled by MMWEC, was divided by the combined residential kilowatt hours of the six entities to arrive at its proposed entitlement factors. (Exh. 23)

The results of three of the four proposed methods were as follows:

	Methodology Proposed		
Out-Of-State Entities	Total Kilowatt Hours (Exh. 13)	Residential Kilowatt Hours (Exh. 23)	Number of Residential Cust. (Exh. 192)
CMEEC	14.01%	4.33%	6.72%
MMWEC	51.02	44.86	36.42
Vermont	8.50	9.97	28.77
AMP-Ohio	6.46	4.95	5.69
Allegheny	18.74	35.04	21.56
Lansdale	1.27	0.85	0.84
	100.00%	100.00%	100.00%

In comparing the results obtained under these three methods, it is important to bear in mind that the figures used by CMEEC and MMWEC to obtain entitlement factors reflect their position on brief that, with regard to Vermont, only data related to Vermont's customers served by publicly-owned utilities should be considered. Only Staff's proposal includes data related to Vermont's customers served by investor-owned utilities.[19]

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[19] Although MMWEC presented Exhibit No. 24 which shows an allocation on the basis of all Vermont residential customers served off of public and private systems, its position on brief is that the Vermont Department of Public Service is not an NRA public body. MMWEC's position is that only those residential customers served by publicly-owned facilities should receive Niagara power.

The fourth method, proposed by AMP-Ohio, considered the number of residential customers served by non-investor-owned utilities, and the unemployment levels of the neighboring states, based on figures compiled by AMP-Ohio. The results were a range of entitlement factors (Exh. 160, Sch. 10.0):

States	Residential Customers (%)	1981 Unmployment Number	1981 Unmployment (%)	Entitlement Factor (%)
Connecticut	6.2	100,200	8.0	6.2- 8.0
Massachusetts	21.9	218,400	17.5	17.5-21.9
Ohio	41.7	487,700	39.2	39.2-41.7
Pennsylvania	25.5	426,700	34.3	25.5-34.3
Vermont	4.9	11,800	0.9	0.9- 4.9
	100.0% (Rounded)	1,244,800	100.00% (Rounded)	

In presenting above the methods proposed by the four parties, no attempt has been made to adjust the figures compiled and used by each of the four parties in order to place the four methods on a consistent base. Rather, the methods are presented just as they were proposed, with the identical figures used by the proponents. For example, the illustration of AMP-Ohio's method *supra* includes in the count of residential customers all residential customers served by non-investor-owned utilities in the State of Ohio, while the illustrations of the methods proposed by MMWEC, CMEEC, and Staff use data related only to service in Cleveland. The methods have been presented in this manner simply for a comparative review of methodology principles. After comparing the methods and their results and choosing which among them is most consistent with the purposes of the NRA, the figures pertaining to each of the out-of-state entities will be adjusted as the record requires to arrive at appropriate entitlement factors.

We turn first to the proposed total customer load methodology. Allocating Niagara project power by total customer load is the most definite of the four proposed methods, but it would not result in the domestic and rural customers being the primary beneficiaries of the Niagara power and thus would fly in the face of the dictates of the NRA.[20] As may be ascertained below, applying just Staff's data compilations for consistency in the total load and residential load methodologies, a wide and unjustifiable distortion in entitlements will occur if total load instead of residential load is relied upon (Exh. 187):

Out-of-State Entities	Residential Load (MWH)	Entitlement Factor (%)	Total Load (MWH)	Entitlement Factor (%)
CMEEC	290,168	5.74	1,251,867	10.11
MMWEC	1,650,470	32.65	4,769,953	38.53
Vermont	1,611,010	31.87	3,994,368	32.26
AMP-Ohio	182,477	3.61	577,346	4.66
Allegheny	1,289,063	25.50	1,675,155	13.53
Lansdale	31,553	0.63	113,090	0.91
Total	5,054,742	100.00%	12,381,779	100.00%

In particular, note the difference in the resultant entitlements between CMEEC and Allegheny. Even though Allegheny represents 25.50 percent of the total residential usage, the total load method would allocate only 13.53 percent of the out-of-state portion to it. On the other hand, CMEEC represents 5.74 percent of the total residential usage, but it would receive 10.11 percent of the Niagara power. Thus, the total load method of allocation would

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[20] Domestic and rural customers exclude commercial and industrial customers. See Opinion No. 151 (21 FERC at 61,134-36). According to the evidence in this record, domestic and rural customers include residential customer groups as well as small farm classes. (Exh. 21, p. 9; Exh. 18, p. 42; Exh. 44, p. 7)

place less emphasis upon residential usage.[21] Furthermore, it would place no constraint on an applicant from actively seeking potential commercial/industrial customers in order to increase its share of Niagara power. The total load method results in a distortion of the allocation, to the benefit of systems serving large industrial loads, and wanders from a primary NRA purpose which is to benefit rural and domestic consumers.[22]

Further, the NRA directs that Niagara power be allocated "in such manner as to encourage the widest possible use." (18 USC § 836 (b)(1)) This is reasonably construed to refer to a numerical, not volumetric, dispersion of power. As Witness Murry for AMP-Ohio correctly noted, the concept of widest possible use implies the dispensation of Niagara power to a large number of customers. (Exh. 159, p. 14) Because of the size of commercial/industrial loads, the total load method would involve a lesser number of total customers—residential, commercial and industrial customers—than would the per residential customer method. Adoption of the total load methodology would dilute the meaning of "widest possible use."

Turning now to the total residential load concept, although the NRA distinguishes between residential customers and nonresidential customers, it does not make a distinction between the two residential customer groups,

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[21] Allegheny's witness David L. Mohre pointed out that because of MMWEC's and CMEEC's large percentage of industrial and commercial loads, Allegheny, who has predominately residential loads, would be at a disadvantage. (Exh. 99, p. 6)

[22] Consider a hypothetical example. Two preference customers have only residential loads which are exactly the same. They would be entitled to an equal share of Niagara power. If one preference customer began serving an industrial customer, a portion of the Niagara power would go to serve the industrial customer. This would result in less power for the residential loads of both preference customers. Additionally, adoption of a total load methodology would enhance each preference customers' desire to add large commercial/industrial loads.

i.e., domestic and rural customers. The total residential load methodology would make such an unwarranted distinction, as the following chart illustrates:

Out-Of-State Entities	Residential KWH Per Customer	Entitlement Factor (%) Number Of Residential Cust.	Entitlement Factor (%) Residential KWH
CMEEC	6,161	6.72	5.74
MMWEC	6,463	36.42	32.65
Vermont	7,988	28.77	31.87
AMP-Ohio	4,571	5.69	3.61
Allegheny	8,529	21.56	25.50
Lansdale	5,388	0.84	0.63
		100.00%	100.00%
Average	7,210 KWH/customer		

The existence of differences in residential KWH per residential customer results in a customer with more consumption getting more of an allocation if the residential load method is used. The preference entity gets a greater allocation when its residential KWH per residential customer is above the average of 7,210 per customer.[23]

For example, in 1980 the City of Cleveland residential load was 182,477 MWH. It had 39,920 residential customers for an average usage of 4,571 KWH per residential customer, as shown above. Allegheny, which is a cooperative serving rural customers (Exh. 99, p. 5), had nearly double that amount -- 8,529 KWH per residential customer. (Exh. 187) Thus, the residential load method of allocation would tacitly distinguish between domestic and rural customers, and discriminate in favor of the latter. This is not the case when using the per residential customer method

[23] Staff's figures were used here for consistency (Exh. 187).

where each residential user would be entitled to the same amount of Niagara power.[24]

The remaining two methods of allocation, *i.e.*, those proposed by Staff and AMP-Ohio, are both based upon the number of residential customers (domestic and rural) but the one proposed by AMP-Ohio is supplemented by *relative* unemployment rates: Ohio had an unemployment rate of 9.4 percent in 1981, but the total number of unemployed in Ohio was about 39.2 percent of the total unemployed in the five affected neighboring states. This latter figure was one of the unemployment rates used by AMP-Ohio in determining its entitlement factors (*see* AMP-Ohio's entitlement table, *supra*). According to AMP-Ohio, unemployment takes into consideration more directly the economic well-being of the domestic and rural customers.

The unemployment rates used, however, are not reliable for the purpose of computing appropriate energy entitlements. First, the relative unemployment rates are statewide figures; they are not unemployment rates for the service territories of preference customers. Secondly, as noted below, the unemployment rates themselves vary significantly from year to year (Exh. 160):

	Unemployment Rate (%)				
	1976	1977	1978	1979	July 1981
Connecticut	9.5	7.0	5.2	5.1	6.3
Massachusetts	9.5	8.1	6.1	5.5	6.7
Ohio	7.8	6.5	5.4	5.9	9.4
Pennsylvania	7.9	7.7	6.9	6.9	8.1
Vermont	8.7	7.0	5.7	5.1	5.4

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[24] In choosing between the per residential customer method and the residential load method, the AMP-Ohio witness preferred the former method since he believed the residential load method may dilute the meaning of widest use. (Exh. 159, p. 15)

Although it would be a desirable goal to ensure that those who are the neediest are actually being benefited the most by Niagara power, AMP-Ohio has not presented any evidence which could reasonably support a conclusion that this goal is attainable through the adoption of its methodology.

From the foregoing discussion and analysis it is concluded that the most reasonable method of apportioning Niagara power among out-of-state preference customers is one which uses the number of residential customers (domestic and rural) served by each preference customer. CMEEC's proposal to allocate on the basis of total load distorts the entitlement factors in favor of systems serving a greater industrial load, and thus fails to further the Congressional purpose in the NRA to allocate preference power for the benefit of rural and domestic users. CMEEC's method also fails to fulfill the Congressional mandate of encouraging the widest possible use of the power because it would permit an allotment of large amounts of power to systems serving relatively few large industrial customers. MMWEC's proposed method of allocation on the basis of residential load discriminates in favor of rural customers to the detriment of domestic users, when the NRA makes no distinction between those types of users. AMP-Ohio's hybrid method of allocation on the basis of the number of residential customers served by non-investor-owned utilities and the relative unemployment in the state is unacceptable not only because it relies on fluctuating unemployment figures but moreover, because no correlation has been shown between those figures and the areas where the recipients of the power are located. In contrast, Staff's method of allocating on the basis of the number of residential customers (domestic and rural) served by a preference customer pays proper heed to the Congressional directives that the primary beneficiaries of Niagara preference power are to be rural and domestic users, and that the power is to be made available to pref-

erence customers in a manner which encourages the widest possible use.

In arriving at this conclusion, the Presiding Judge has considered the argument made by CMEEC that the term residential customer is not uniformly defined in utility practice. For instance, CMEEC pointed out that master metered apartment dwellings would either not reflect the true number of residential customers receiving service or not be classified as residential. (Exh. 12, p. 9) But this does not provide sufficient cause to reject an otherwise acceptable methodology. CMEEC has not submitted any quantification of its example to support a conclusion that the asserted deficiency in Staff's data base compilation is of a significant dimension. Furthermore, the burden is on the parties seeking an allotment to make sure that such problems as master metered apartment buildings are properly accounted for.[25] We shall now proceed to a review of the record and make such adjustments to Staff's data as may be warranted.

2. The Entitlements

Having determined that Staff's method of apportioning power on the basis of the number of residential users is most consistent with the purposes of the NRA, the next task is to identify those residential users in each state who have a legal entitlement to Niagara power. By the term "legal entitlement," we mean those users who are in the class of consumers whom Congress intended to benefit in

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[25] CMEEC also stated that Allegheny included residential members who are not really residential, and that its customer classification is based upon transformer size. (Exh. 12, p. 9). However, Allegheny specifically accounts for those residential customers who are not really residential: there are 151,827 residential accounts which include 680 customers classified as "Other Consumers." (Exh. 99, p. 5 and Exh. 100, p. 1) Staff uses the difference of these numbers (151,147) in its allocation. In addition, Allegheny does not state that it classifies residential customers by transformer size. It only classifies commercial and industrial customers that way. (Exh. 99, p. 5)

the NRA, those" . . . domestic and rural consumers . . . in neighboring states . . ." who are to be the primary beneficiaries of Niagara power.

Before determining the breadth of the class of out-of-state beneficiaries of Niagara power, the first logical step is to define the smallest unit within the class: what users are "domestic and rural", within the contemplation of the NRA? Inconsistent Commission pronouncements complicate the definition.

In *Vermont* the FPC addressed the issue of whether the term rural users was limited to domestic, *i.e.* residential, users. In that proceeding, Vermont had argued that Allegheny's distribution of preference power to industrial and commercial users in rural areas was in violation of the NRA. The FPC rejected Vermont's argument, and agreed with Allegheny that the delivery of preference power to (55 FPC at 1116):

> . . . country stores, schools, gas stations, etc., and a few small industrial loads that are always found and needed in rural areas . . . was within the intent of Congress . . . and . . . if Congress did not intend such service, it would not have specified "domestic and rural" customers, but only domestic.

Under this definition, the term "domestic and rural consumers" includes rural industrial and commercial users. Staff's figures (Exh. 192) would thus have to be adjusted, at least in the case of Allegheny, to include such users.

However, the commission recently in Opinion No. 151 expressed a different view as to the definition of domestic and rural users. There, the Commission recognized that the terms "industrial and commercial loads" and "domestic and rural loads" are mutually exclusive. (*Mimeo.*, p. 61) According to this view, a rural industrial load is not within the ambit of the term "domestic and rural". Staff's fig-

ures, (Exh. 192) which include only rural residential loads, would thus be correct.

In the face of this seemingly irreconcilable conflict, the Presiding Judge declines to second-guess the ultimate decision of the Commission as to the true meaning of the term "domestic and rural consumers." Rather than choose between the definitions discussed above, the Presiding Judge endorses and adopts PASNY Witness Deasy's definition of rural and domestic consumers as "residential and small farm classes" of users. (Exh. 44, p. 7) Witness Deasy's explanation of the term was unchallenged and thus stands as the only statement of the parties as to the meaning of the term "domestic and rural consumers." Furthermore, that definition is consistent with the NRA: both the terms "rural" and "domestic" are given meaning, and industrial and commercial users (albeit rural) are not included in the allocation and thus are not permitted to dilute the benefits of Niagara power.

Having defined the smallest unit, we must next determine the universe of such users who comprise the class of consumers having a legal entitlement to Niagara power. At the outset, it is obvious that this universe, depending on how it is defined, may have vastly varying dimensions. In defining the dimensions of the universe, we are guided by the same directives in the NRA as governed the choice of an apportioning method: the NRA directs the distribution of Niagara power for the benefit of domestic and rural users in a manner which encourages the widest possible use. The arguments made explicitly or implicitly by the various parties will be reviewed to determine which conforms best to these directives.

Given the definition of domestic and rural users which was adopted above, the largest possible universe of consumers legally entitled to receive Niagara power consists of all residential and small farm consumers, whether served by preference entities or investor-owned utilities in the

neighboring states. The argument that the universe may extend to that dimension and encompasses that number of users is at the very least supportable. The NRA states that domestic and rural users are to be the particular beneficiaries of Niagara power. As the FPC stated in *Vermont,* nothing in the NRA "preclude[s] distribution of Niagara power through investor-owned utilities to those intended to be benefited." (55 FPC at 1113) Further, the NRA directs that Niagara power be dispersed as widely as possible. Certainly, a dispersal based on the total number of eligible users in the neighboring states accomplishes that goal.

However, the adoption of a figure representing the total state-wide number of residential and small farm users being served would run afoul of the NRA's further directive that public bodies and non-profit cooperatives be given preference in the receipt of Niagara power. If power were allocated on the basis of the state's total of domestic and rural users, we would fail to recognize the fact that all power distributed out-of-state is preference power, to be sold to public bodies and non-profit cooperatives. Thus, it is necessary to conclude that the universe of consumers who are legally entitled to receive Niagara power consists, at the most, of those domestic and rural users served by public bodies and non-profit cooperatives.

Certain of the parties have argued that a smaller group of users than the one described immediately above should be counted in developing the entitlements. It has been argued that, in the case of AMP-Ohio, only those residential users served in Cleveland should be considered because AMP-Ohio has not shown that it can receive the power for the benefit of all potential domestic and rural users. It has also been argued that, regarding CMEEC, only those domestic and rural users served by the three member municipal systems should be counted, and those users served by non-member municipal systems should not, because CMEEC has not shown that the non-member sys-

tems would receive power. Vermont has argued strenuously that any discussion of allocations to MMWEC and CMEEC must take into account the existence of a bottleneck in transmission capacity in New York State. Finally, it has been argued that Lansdale has demonstrated no capacity to receive any power that the Commission may allot to it.

Upon consideration, these arguments supply no valid rationale for narrowing the class of consumers to be counted in the entitlement determination. We are not concerned at this point with the factual question of any party's ability to receive power. The very serious factual issues which are raised will be discussed *infra*. We are, conversely, questioning whether, as a matter of law, any domestic and rural consumers served by public bodies and non-profit cooperatives are not legally entitled to power. The NRA provides no support for drawing a line which excludes any of these consumers. Indeed, the NRA's multiple directives that Niagara power be distributed for the benefit of domestic and rural consumers, in a manner which encourages the widest possible use, provides a basis for the conclusion that no rural or domestic user served by a preference body may be excluded from legal entitlement to Niagara power, and thus all such users should be counted. Therefore, an adjustment of Staff's numbers is necessary.

Having determined the nature of the data base, the next step in determining legal entitlement is to cull from the record a figure for each out-of-state entity which represents the total of domestic and rural users served by preference customers in the entity's state. The term "preference customers" refers, of course, to the "public bodies and non-profit cooperatives" who are the distributors of power, and not to membership organizations of preference customers. (*See* Opinion No. 151, *mimeo.*, pp. 49-54) For example, CMEEC, MMWEC, AMP-Ohio, and Allegheny are not themselves preference customers, but rather are membership organizations composed of public

bodies and non-profit cooperatives. These latter distributors are the true preference customers.

Legal eligibility to receive Niagara power does not depend on membership in one of these organizations. The focus is not on the number of domestic and rural consumers served by members of MMWEC, for example. Rather, in the case of Massachusetts, the goal is to find in the record a figure which is the number of domestic and rural users served by preference customers in the state, nonwithstanding [sic] whether they are MMWEC members. Thus, the figure for Massachusetts will include all domestic and rural customers, *i.e.*, residential and small farm classes, served by public bodies and non-profit cooperatives in the state.

In making these determinations it is recognized that a figure which includes all eligible users, in any state, may not be found in the record. For example, the figure used for MMWEC may not include the small farm users or users served by rural cooperatives which should be included. However, no other figures were supplied on this record. The parties will be able to demonstrate in future allocation proceedings the number of eligible users to be counted in the entitlement determination. As voiced previously, the only concern here and now is with legal entitlement, and not the factual likelihood of any group of users receiving the power.

First, as to MMWEC, there is no real dispute about the number of domestic and rural consumers to use in the Staff method for the State of Massachusetts. Staff's number, which is 255,361 users, is the total of all residential users served by all municipal systems in Massachusetts, who all happen to be MMWEC members. There is nothing in the record which indicates that there are any eligible users served by cooperatives. Thus, no adjustment of the Staff number is necessary.

The determination of what figures to use for CMEEC and AMP-Ohio presents a problem: both are membership organizations consisting of preference customers, but in both cases there are preference customers in the state who are not members. It has been argued that the figure used in the Staff method should only include the consumers served by the member systems of CMEEC and AMP-Ohio. Based on the determination made above that the data base for legal entitlement will be all rural and domestic consumers served by preference customers, it is clear that that argument must be rejected. There is no basis in the NRA, nor are there any applicable general principles of law, that would justify the failure to include in the calculation of entitlements those consumers served by preference customers who are not members of CMEEC or AMP-Ohio in their respective states. Thus, for the purpose of calculating the legal entitlement of CMEEC and AMP-Ohio, all rural and domestic users served by preference customers in Connecticut and Ohio, respectively, will be counted. Because the record contains no evidence of the number of consumers served by rural cooperatives, Staff's figure for CMEEC, which includes all residential users served by Connecticut municipals (47,100 users), and AMP-Ohio's figure, which includes all Ohio residentials served by municipal systems (237,794 users) (Tr. 2918) will be used.[26]

With regard to Vermont, the inclusion in the figure used to calculate its entitlement of virtually all residential consumers in that state is consistent with and required by the finding made here that all rural and domestic consumers served by preference entities should be counted. It was determined earlier in this Decision that the Ver-

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[26] AMP-Ohio's witness Murray testified in support of the 237,794 user figure. His figures on Exhibit 160, Schedule 3.0 in this regard, are inconsistent with that positive testimony. As a consequence, no reliance is given to those exhibit figures.

mont PSB is a "public body", within the contemplation of the NRA. Thus, the 201,678 consumers who receive the benefits of Niagara power through the vehicle of privately-owned and publicly-owned utilities are properly counted in the figure as customers of a public body.

There is no real dispute as to the numbers to use for Allegheny and Lansdale. Allegheny represents rural co-operatives, *i.e.*, preference customers, who serve 151,147 residential users. Likewise, Lansdale serves 5,856 residential users in its municipal system. Those figures, used by Staff, are therefore, appropriate.

Thus, it is found on the basis of this record, that the out-of-state entities have the following legal entitlements to Niagara power:

Out-of-State Entities	Number of Domestic and Rural Customers	Entitlement Factor (%)
CMEEC	47,100	5.24
MMWEC	255,361	28.41
Vermont	201,678	22.44
AMP-Ohio	237,794	26.45
Allegheny	151,147	16.81
Lansdale	5,856	.65
Total	898,936	100.00%

Utilizing the above adjusted Staff figures and entitlement factors produces the following results:

Out-of-State Entities	Entitlement Factor (%)	Total Power KW	Peaking Power KW	Firm Power KW
CMEEC	5.24	12,995	2,096	9,851
MMWEC	28.41	70,457	11,364	53,411
Vermont	22.44	55,651	8,976	42,187
AMP-Ohio	26.46	65,596	10,580	49,726
Allegheny	16.81	41,689	6,724	31,603
Lansdale	.65	1,612	260	1,222
Total	100.00%	248,000KW	40,000KW	188,000KW

3. The Allocations

As demonstrated by the foregoing discussion, the NRA provides the framework for allocation of Niagara power: it directed the selection of the method of allotment of power adopted above and shaped the data base used in the method by indicating which consumers Congress intended to benefit from Niagara power. However, the inquiry into the issue of what allocations to make to the out-of-state entities does not end at the entitlement determination. Although the dictates of the NRA have been satisfied and a plan for future entitlements established, the factual record developed in this proceeding demands modification of the legal entitlements calculated above. The need for modification derives from several sources. First, to assure that the number of domestic and rural consumers used in the Staff's allocation method has any meaning on a practical level, it is necessary to determine, on the basis of evidence adduced on the record, that the consumers counted in the figures and, for whose benefit the power is allocated can reasonably be anticipated to receive the benefit of power so allocated. And, closely related to the first point, having determined the number of consumers to be counted in the calculation, the record must demonstrate that the users so counted have the physical capability to receive the power allocated to them. Only if both conditions exist will the directives of the NRA, as

implemented by the method and data base selected, be carried into being. Thus, absent a showing of facts sufficient to demonstrate that the allocation made to any particular entity will carry out the statutory purposes on which this Decision is based, no power will be allocated for it is not wise to allocate power blindly on the basis of the law with no eye to the facts.

In assessing the evidence of record, it is recognized that those entities who do not yet receive Niagara power carry a heavy burden, particularly in regard to transmission capability. Furthermore, with regard to the present recipients of Niagara power, it is difficult to know what, if any, additional power to which the recipient is legally entitled can actually be transmitted to that party. For example, firm power is power always available except under force majeure situations or under other specified conditions. Firm power requires definite commitments by both the buyer and the seller. Likewise, power sold on a less-than-firm or even completely nonfirm basis due to transmission limitations, may require contractual arrangements. In this regard, then, existing contracts and arrangements become relevant, because unless there is other record evidence, these arrangements are the best and most solid evidence of what amount of power can be transmitted and which consumers will receive it. However, as has already been determined, the contracts in and of themselves, are not binding on the outcome of the present proceeding.

(a) Lansdale

As explained above, a preference customer must show the physical capability to receive the Niagara power to which the customer is legally entitled. The record indicates that Lansdale does not have a wheeling (transmission) agreement with Philadelphia Electric Company necessary to receive Niagara power. Nor has Lansdale made a provision to construct $1^1/_2$ miles of transmission line necessary

to facilitate the wheeling of this power. (Tr. 2055-56; 2077-78) Lansdale has failed to sustain its burden of proof on the issue of its capability to receive its entitlement and and as a consequence it shall not be allocated any power in this proceeding.

(b) AMP-Ohio

AMP-Ohio has failed to demonstrate on the record which consumers will actually receive the benefit of Niagara power and, if power is allocated to AMP-Ohio, how it will be transmitted to those users. AMP-Ohio's witness Murry was unable to substantiate what number of residential customers served by non-investor-owned utilities in Ohio would actually receive the benefit of Niagara power. He revealed that he knew little about the potential residential customers. (Tr. 2777-80) Further, he was unaware whether these utilities had arranged or could arrange for the transmission of Niagara power to the potential residential customers. (*Id.*) If AMP-Ohio received an entitlement based on the number of residential customers served by all municipal systems in Ohio, its entitlement, as shown above, would constitute 26.45 percent of the total out-of-state allocation, or approximately 50 MW of firm power (26.45% times 188 MW) and 11 MW of peaking power (26.45% times 40 MW). Because the record does not show that this amount of power could actually be transmitted, or that the residential users used to derive the entitlement figure would actually receive the power, it is necessary to modify the figure used for AMP-Ohio in arriving at an allocation.

As noted above, the most persuasive and, at least in AMP-Ohio's case, the only evidence of which users will receive Niagara power is found in existing contracts and arrangements. Thus, it is necessary, on the basis of record evidence, to reduce the figure used to compute its allocation to 39,920 users. This figure reflects the number of domestic users in the City of Cleveland, all of whom are present recipients of Niagara power. The existing contract between PASNY and AMP-Ohio (Exh. 63) provides for sale

by PASNY of 19 MW of firm power and 4 MW of peaking power. For purposes of this proceeding, therefore, in the absence of a showing of a capability to receive more power, AMP-Ohio's allocation will be capped at present levels.

(c) MMWEC and CMEEC

A serious question has been raised as to the capability of MMWEC and CMEEC to receive Niagara power. The allocation of Niagara power to MMWEC and CMEEC is affected by west to east transmission "bottlenecks" or limitations in the State of New York. These transmission limitations occur when the amount of power transmitted on the lines reaches the capability of the lines. Power cannot be transmitted across any line once its capability is reached. Nonetheless, according to Staff's witness James K. Newton, the lines would be loaded to the limit only about 38 percent of the time, or about 3,356 hours out of 8,760 hours in a year. He stated that the periods during which there would be no limitations (62 percent of the time) appeared adequate to transmit MMWEC's and CMEEC's Niagara power. He did not indicate whether the asserted 62 percent of the time would be a continuous period allowing for even a partial firm power allocation. He believed that MMWEC's and CMEEC's entitlement could be sent on a nonfirm basis rather than firm. (Exh. 184) PASNY witness Philip J. Pelligrino agreed that power could currently be sent across the transmission "bottlenecks" if the power were sent on a nonfirm basis. (Tr. 1681, 1684)

MMWEC stated that it would accept nonfirm power from PASNY in that "it needs the energy wheeled, but it does not need it wheeled on a firm basis, *i.e.*, at every hour of the day." (MMWEC Initial Br. at 200) CMEEC witness Walter V. Truitt indicated that CMEEC would benefit from the purchase of nonfirm as well as firm power from PASNY. (Tr. 894) By purchasing nonfirm power rather than firm power, the significance of the transmis-

sion limitations should be minimal to MMWEC and CMEEC. (Exh. 184, p. 5) Therefore, lacking any evidentiary support for a firm power allocation, MMWEC's and CMEEC's allocation shall only be nonfirm Niagara power.

It is recognized that, notwithstanding the transportation bottlenecks noted above which render uncertain the transmission of any type of power other than nonfirm power, MMWEC and CMEEC may prefer to purchase all or a portion of their legal entitlement in firm power, and receive that power in whatever amount and type which the transmission facilities permit. That type of arrangement would not meet the mandates of the NRA enunciated herein. The purpose of this Decision, and the heart of this case, is the allocation among competing, eligible and needy users of a finite amount of a valuable commodity. The allocation developed and adopted herein demonstrates an effort to allocate, under an appropriate allotment scheme, all legally available power for out-of-state use to all eligible users in amounts and types which the record demonstrates they can receive and use. An allocation of firm power to MMWEC and CMEEC under the capacity limitations disclosed on this record would be a de facto nonfirm allocation: in essence, an allocation on a take-or-pay for and capacity availability basis. Thus, an amount of the most valuable commodity herein allocated, namely firm power, would be denied to other eligible out-of-state users who have demonstrated an ability to receive such power on a firm basis.

(d) Allegheny

No dispute has arisen as to the factual question of which consumers will receive power allotted to Allegheny. Thus, Staff's figure of 151,147 will be used. Although Allegheny's present contract with PASNY provides for sale of 86 MW of firm power and 21 MW of peaking power, it has previously received contractual amounts of 130 MW of firm power and at other times 105 MW of firm and 25 MW

of peaking power. (Exh. 98, pp. 6-8; Exhs. 46, 246) Nothing in the record indicates that Allegheny can receive more than 130 MW of power, and thus whatever allocation it receives cannot exceed this maximum capability.

(e) Vermont

Vermont's history of receipt of Niagara power, coupled with its method of passing through the benefits to virtually all residential users in the state, provides solid guidance in the determination of that state's allocation. The record demonstrates that the benefits of Niagara power are passed through to some 201,678 residential consumers and its allocation will be based on that figure. (Tr. 2619-20; Tr. 2687-88) Under present arrangements, 40 MW of firm and 10 MW of peaking power is transmitted. In the past Vermont received 50 MW of firm power (Exh. 45) and as a consequence whatever allocation it receives will not exceed that level.

(f) Firm and peaking power allocations

Given the facts discussed above, as to (1) the exclusion of Lansdale from receipt of any power, (2) the allocation to MMWEC and CMEEC of nonfirm power only and (3) the residential figures to be used for the allocations to AMP-Ohio, Allegheny and Vermont, the following allotments of firm and peaking of power emerge:

Out-of-State Entities	No. of Residential Cust.	Allocation Factor (%)	Peaking Power (KW)	Firm Power (KW)
Vermont	201,678	51.35	20,540	96,538
AMP-Ohio	39,920	10.16	4,064	19,101
Allegheny	151,147	38.49	15,396	72,361
Total	392,754	100.00%	40,000KW	188,000KW

Under the allocations immediately above, Vermont would receive 56 MW more firm power and 10 MW more peaking power than it currently receives. AMP-Ohio (City of Cleveland) would get slightly more than its contract amounts. Lacking any evidence to the contrary, its contract amounts are construed as the delivery limitations due to capacity constraints. In the absence of a showing on the record of a capability to transmit the amounts reflected above, these allocations require further modification.

AMP-Ohio will be allocated no more than its contract entitlement of 19 MW of firm power and 4 MW of peaking power by virtue of the capacity constraints. Similarly, Vermont will not be allocated the 96.5 MW of firm power and 20.5 MW of peaking power reflected in the table above. However, the record does support the conclusion that Vermont is capable of receiving 50 MW of firm power. Because firm power is more valuable than peaking power[27] Vermont will be allocated 50 MW of firm power and no peaking power. This leaves a remainder of 119 MW of firm power which shall be allocated to Allegheny. Since it has demonstrated a capability of receiving 130 MW of firm power, Allegheny shall also be allocated 11 MW of peaking power. The evidence of record supports a conclusion that the allocation of 119 MW of firm power to Allegheny will provide 57 percent of the power necessary for Allegheny to meet the loads of its residential customers.[28] The final

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[27] For example, Allegheny has commented that it would pay more for purchased power costs because PASNY changed its allocation from 130 MW of firm power to 105 MW of firm power plus 25 MW of peaking power. (Exh. 98, p. 7)

[28] Allegheny's residential load is 1,289,063,334 KWH. Since it serves 151,147 residential customers, the load per customer is 8,529 KWH/customer. (Exh. 187) If Allegheny receives 119,000 KW of Niagara firm power, it would receive an associated energy of 740,132,400 KWH. (.71 x 8,760 hours x 119,000 KW). The capacity factor of the Niagara project is 71%. (Exh. 188, p. 8) Thus, the firm power would be 4,897

allocations of peaking and firm power ordered herein are, therefore as follows:

Out-Of-State Entities	Peaking Power (MW)	Firm Power (MW)
Vermont	0	50
AMP-Ohio	4	19
Allegheny	11	119
Total	15 MW	188 MW

Thus the full 188 MW of firm power has been allocated. Although a legal entitlement exists for the allocation of 40 MW of peaking power, this record reflects, in light of the firm power allocation, a factual ability to absorb only 15 MW of peaking power. The difference between the 15 MW allocated and the 40 MW entitlement will revert to PASNY for distribution in-state in accord with the final outcome of Opinion No. 151. Those out-of-state entities receiving firm and peaking power are placed on notice that in ensuing allocation proceedings, beginning with the 1985 allocations, they may well be denied a portion of the power allocated herein should MMWEC, CMEEC and Lansdale perfect the capacity debilities discussed earlier.

(g) Nonfirm power allocations

Consistent with the discussion above, 10 percent of the nonfirm Niagara power will be allocated by the following percentages, assuming all out-of-state entities can receive it. Under adverse water conditions, each out-of-state entity would receive the following allocation (*See* Footnote 17):

KWH/customer, or 57% of the residential load $\left(\frac{4,897}{8,529} \times 100\%\right)$.

Out-of-State Entities	No. of Residential Customers	Allocation Factor (%)	Nonfirm Power (KW)
CMEEC	47,100	6.78	1,356
MMWEC	255,361	36.73	7,346
Vermont	201,678	29.01	5,802
AMP-Ohio	39,920	5.74	1,148
Allegheny	151,147	21.74	4,348
Total	695,206	100.00%	20,000KW

To the extent any of these entities do not require any or all of their respective allocation of nonfirm power, PASNY should make those amounts available to the remaining out-of-state entities on a pro rata basis.

SUMMARY

In summary, this Initial Decision establishes, among other matters, (1) the methodology and data base to be used in future out-of-state allocations beginning with the 1985 allocations alluded to earlier and (2) interim allocations for the out-of-state entities involved in this proceeding, to take effect immediately and to remain in place until new entitlements and allocations are legally established.

With the findings and conclusions set out above, all issues set for hearing in the Commission's February Order which have actually been litigated are resolved. It is recognized that one of the issues set for hearing, *i.e.*, whether there is a possible linkage between allocations of St. Lawerence [sic] power and the allocations of Niagara power made here, has not been addressed, The absence of attention to this issue is based on the parties' failure to produce evidence on the record related to this issue; some parties have addr ssed this issue only to the extent of making a passing reference on brief to the fact that Ver-

mont presently receives the bulk of the St. Lawerence [sic] power sold outside of the State of New York, and thus has a lesser claim to Niagara power. The argument has been duly noted, but no party has demonstrated the need to address that issue at this time. As attested to by Staff's witness Biggerstaff, (Exh. 186, p. 11) that issue should more properly be addressed when PASNY makes its allocation of both Niagara and St. Lawerence [sic] power in 1985.

ORDER

WHEREFORE, It is ordered, subject to review of the Commission on appeal, or upon its own motion that PASNY shall, in compliance with the terms of its license and the Niagara Redevelopment Act, make available within 60 days of this order, project power to the out-of-state entities in the amounts set forth herein under subsections 3(f) Firm and peaking power allocations and 3(g) Nonfirm power allocations. Within the same period PASNY shall tender contracts to the out-of-state entities with terms and conditions consistent with the allocations herein ordered.

George P. Lewnes
Presiding Administrative Law Judge

APPENDIX F

STATUTE INVOLVED

16 U.S.C. § 836 Authorization to license construction and operation; licensing conditions

(a) The Federal Regulatory Commission is expressly authorized and directed to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement.

(b) The Federal Energy Regulatory Commission shall include among the licensing conditions, in addition to those seemed necessary and required under the terms of the Federal Power Act [16 U.S.C.A § 791a et seq.], the following:

(1) In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance. In any case in which project power subject to the preference provisions of this paragraph is sold to utility companies organized and administered for profit, the licensee shall make flexible arrangements and contracts providing for the withdrawal upon reasonable noticed and fair terms of enough power to meet the reasonably foreseeable needs of the preference customers.

(2) The licensee shall make a reasonable portion of the project power subject to the preference provisions

of paragraph (1) of this subsection available for use within reasonable economic transmission distance in neighboring States, but this paragraph shall not be construed to require more than 20 per centum of the project power subject to such preference provisions to be made available for use in such States. The licensee shall cooperate with the appropriate agencies in such States to insure compliance with this requirement. In the event of disagreement between the licensee and the power-marketing agencies of any such States, the Federal Energy Regulatory Commission may,after public hearings, determine and fix the applicable portion of power to be made available and the terms applicable thereto: *Provided,* That if any such State shall have designated a bargaining agency for the procurement of such power on behalf of such State, the licensee shall deal only with such agency in that State. The arrangements made by the licensee for the sale of power to or in such States shall include observance of the preferences in paragraph (1) of this subsection.

(3) The licensee shall contract, with the approval of the governor of the State of New York, pursuant to the procedure established by New York law, to sell to the licensee of Federal Energy Regulatory commission project 16 for a period ending not later than the final maturity date of the bonds initially issued to finance the project works herein specifically authorized, four hundred and forty-five thousand kilowatts of the remaining project power, which is equivalent to the amount produced by project 16 prior to June 7, 1956, for resale generally to the industries which purchased power produced by project 16 prior to such date, or their successors, in order as nearly as possible to restore low power costs to such industries and for the same general purposes for which power from project 16 was utilized: *Provided,* That

the licensee of project 16 consents to the surrender of its license at the completion of the construction of such project works upon terms agreed to by both licensees and approved by the Federal Energy Regulatory Commission which shall include the following: (a) the licensee of project 16 shall waive and release any claim for compensation or damages form the Power Authority of the State of New York or from the State of New York, except just compensation for tangible property and rights-of-way actually taken, and (b) without limiting the generality of the foregoing, the licensee of project 16 shall waive all claims to compensation or damages based upon loss of or damage to riparian rights, diversionary rights, or other rights relating to the diversion or use of water, whether founded on legislative grant or otherwise.

(4) The licensee shall, if available on reasonable terms and conditions, acquire by purchase or other agreement, the ownership or use of, or if unable to do so, construct such transmission liens as may be necessary to make the power and energy generated at the project available in wholesale quantities for sale on fair and reasonable terms and conditions to privately owned companies, to the preference customers enumerated in paragraph (1) of this subsection, and to the neighboring enumerated in paragraph (1) of this subsection, and to the neighboring States in accordance with paragraph (2) of this subsection.

(5) In the event project power is sold to any purchaser for resale, contracts for such sale shall include adequate provisions for establishing resale rates, to be approved by the licensee, consistent with paragraphs (1) and (3) of this subsection.

(6) The licensee, in cooperation with the appropriate agency of the State of New York which is concerned with the development of parks in such State, may construct a scenic drive and park on the American

side of the Niagara River, near the Niagara Falls, pursuant to a plan the general outlines of which shall be approved by the Federal Energy Regulatory Commission; and the cost of such drive and park shall be considered a part of the cost of the power project and part of the licensee's net investment in said project: *Provided,* That the maximum part of the cost of such drive and park to be borne by the power project and to be considered a part of the licensee's net investment shall not exceed $15,000,000.

(7) The licensee shall pay to the United States and include in its net investment in the project herein authorized the United States share of the cost of the construction of the remedial works, including engineering and economic investigations, undertaken in accordance with article II of the treaty between the United States of America and Canada concerning uses of the waters of the Niagara River signed February 27, 1950, whenever such remedial works are constructed.

Nos. 86-735, 86-736, and 86-942

In the Supreme Court of the United States

OCTOBER TERM, 1986

ALLEGHENY ELECTRIC COOPERATIVE, INC., PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

METROPOLITAN TRANSPORTATION AUTHORITY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

RHODE ISLAND PUBLIC UTILITIES COMMISSION AND NEW JERSEY BOARD OF PUBLIC UTILITIES, CROSS-PETITIONERS

v.

METROPOLITAN TRANSPORTATION AUTHORITY, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

CATHERINE C. COOK
General Counsel

JEROME M. FEIT
Solicitor

JOSHUA Z. ROKACH
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Whether the phrase "neighboring States" in the Niagara Redevelopment Act (NRA), 16 U.S.C. 836, refers solely to Pennsylvania and Ohio or instead refers to all states within "reasonable economic transmission distance" from the Niagara Power Project.

2. Whether Congress, in giving "public bodies" preference status for hydroelectric power under the NRA, intended to limit the preference to publicly owned entities that are capable of selling and distributing power directly to consumers of electricity at retail.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-28a)[1] is reported at 796 F.2d 584. The March 27, 1985, opinion of the Federal Energy Regulatory Commission (the Commission) (Pet. App. 58a-102a) is reported at 30 F.E.R.C. ¶ 61,323 (1985). The Commission's July 30, 1985, opinion on rehearing (Pet. App. 29a-57a) is reported at 32 F.E.R.C. ¶ 61,194 (1985).

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[1]"Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 86-735.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1986. A petition for rehearing was denied on August 6, 1986 (Pet. App. 1a-2a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Pursuant to the Niagara Redevelopment Act (the NRA), 16 U.S.C. 836 *et seq.*, the Commission issued a license to the Power Authority of the State of New York (PASNY) to construct and operate a power project—the Niagara Power Project (the Project)—utilizing the United States' share of water from the Niagara River. One of PASNY's principal functions is to allocate hydroelectric power generated by the Project. Pet. App. 9a. Under the NRA, PASNY, "in disposing of 50 per centum of the project power," is required to "give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance" (16 U.S.C. 836(b)(1)). Furthermore, in allocating such power, PASNY is required to make a reasonable portion thereof—up to 20 percent (*i.e.*, 10 percent of the Project's total power)—"available for use within reasonable economic transmission distance in neighboring States" (16 U.S.C. 836(b)(2)).

2. The present litigation began in March 1980 when municipal companies in Massachusetts and Connecticut filed complaints with the Commission charging that PASNY had deprived them of their share of the preference power set aside for "neighboring States" under 16 U.S.C. 836(b)(2). In its answer, PASNY acknowledged that Massachusetts and Connecticut qualified as "neighboring States." PASNY indicated, however, that its decision not to sell preference power to those municipalities was permissible because it was already selling a "reasonable" portion of such power to customers outside of New York. PASNY further indicated that the Metropolitan Transportation Authority (MTA),

which is in charge of most mass transit in New York City, was purchasing a portion of the preference power that otherwise would have been sold out-of-state. The Commission consolidated the complaints and it permitted various entities, including the Vermont Department of Public Service (VDPS) and Allegheny Electric Co-operative, Inc. (Allegheny), to intervene in the proceedings. Allegheny's construction, as intervenor, was that "neighboring States" was intended to refer to Ohio and Pennsylvania. In February 1981, the Commission held that Massachusetts and Connecticut, not just Pennsylvania and Ohio, qualified as neighboring states. In addition, the Commission ordered an evidentiary hearing concerning the proper allocation of preference power among the neighboring states. Pet. App. 10a-13a.

On March 27, 1985, after the Administrative Law Judge (ALJ) had completed extensive hearings and had rendered a decision, the Commission entered an order affirming the ALJ in most respects (Pet. App. 15a, 58a-102a). The Commission held that neither the MTA nor the VDPS qualified for preference power because neither was a "public body" (*id.* at 75a-82a). According to the Commission, the term "public bodies" in the NRA means "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail" (*id.* at 80a). Under that definition, MTA failed to qualify because it merely consumed power and did not distribute it; VDPS did not qualify because it did not distribute power itself but simply acted as a wholesale broker to private utilities and municipal systems (*id.* at 80a-82a).[2]

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[2]In reaching its decision with respect to VDPS, the Commission overruled, in relevant part, its prior decision in *Vermont Pub. Serv. Bd.* v. *Power Authority*, 55 F.P.C. 1109 (1976).

On the question of "neighboring States," the Commission reaffirmed its prior ruling that the phrase "neighboring States" was not limited to Pennsylvania and Ohio (Pet. App. 72a-75a). In the Commission's view (*id.* at 73a), "[b]y interpreting 'neighboring states' according to its usual meaning, we give full effect to Congress' desire to share the benefits of the Niagara project among preference customers throughout the region, but on a limited basis." While the Commission acknowledged that there were several references in the legislative history to Pennsylvania and Ohio, it noted that other states in the region were mentioned as well (*id.* at 74a).

On July 30, 1985, the Commission issued an order on rehearing affirming its March 27, 1985, opinion (Pet. App. 29a-57a).

3. The court of appeals affirmed (Pet. App. 3a-28a). In construing the phrase "public bodies," the court concluded—based on a survey of the legislative history—that Congress enacted the NRA's preference provisions so that municipalities would utilize their supply of hydropower "to charge rates which would force the private utilities to reduce their prices or at least serve as a measure by which regulators could set the private utilities' rate of return" (*id.* at 19a-20a). The court reasoned (*id.* at 20a) that such "[y]ardstick competition" could only be effective if the municipal competitor, like the private utility, actually resold electricity to ultimate consumers. If the public entity used the power itself or sold it to private utilities, the private utilities would face no pressure to reduce the prices they charged their customers (*ibid.*). Applying that interpretation of "public bodies," the court agreed with the Commission that neither MTA nor VDPS was eligible for preference power.[3]

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[3]The court (Pet. App. 23a-24a n.8) also rejected MTA's contentions that the Commission ignored mass transit considerations and violated the environmental laws by not classifying MTA as a preference customer. It noted (*id.* at 24a n.8) that the NRA does not require the

On the meaning of the phrase "neighboring States" under the NRA, the court concluded that there was "no evidence" that Congress intended that phrase "to have any meaning other than its literal one: states found to be within reasonable geographical proximity of New York, taking into account all relevant factors and whether they are within reasonable economic transmission distance" (Pet. App. 24a). The court reviewed the legislative history of the "neighboring States" provision and concluded that, in Congress's view, "economic transmission distances were mutable" (*id.* at 25a). The court noted (*ibid.*) that no congressman had suggested during the debates that preference power "should always be available only to those limited areas which happened to be within economic transmission distance in 1957 [when the NRA was enacted]." The court further cited statements by several congressmen that states other than Ohio and Pennsylvania could receive power if they were within economic transmission distance (*ibid.*). Thus, reasoned the court, since Massachusetts and Connecticut were "within reasonable geographical proximity of New York," the public bodies within those states qualified for preference power (*id.* at 24a).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Review by this Court is therefore not warranted.

Commission "to ignore yardstick competition in favor of subsidizing mass transit * * *." In addition, it noted (*ibid.* (citation omitted)) that, on the environmental question, "Congress' intent controls [and in any event] if MTA's subways were permitted to buy the cheaper hydropower directly (rather than from a distributor of preference power), other customers would then be forced to use the more expensive fuel claimed to pollute the environment."

1. Petitioner Allegheny contends (86-735 Pet. 5-29) that the court of appeals and the Commission erred in holding that the phrase "neighboring States" under the NRA's preference provisions includes Massachusetts and Connecticut. According to Allegheny (*ibid.*), only the States of Pennsylvania and Ohio are encompassed within that phrase.

In the first place, Allegheny's interpretation is contrary to the plain language of the statute. Had Congress intended to designate Pennsylvania and Ohio as the exclusive out-of-state recipients of preference power, it could have—and presumably would have—done so.[4]

Moreover, the legislative history does not support Allegheny's position. As the court of appeals indicated (Pet. App. 25a), while Congress acknowledged that for a period of time only customers in western Pennsylvania and northeastern Ohio would receive preference power, no congressman stated that such power should always be available only to those limited areas. To the contrary, as the court noted (*ibid.*), members of Congress acknowledged that economic transmission distances were mutable.[5]

In sum, both the language and history of the NRA support the interpretation of "neighboring States" adopted by the Commission and the court of appeals.

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[4]As the Commission noted by way of contrast (Pet. App. 73a n.6), Section 5(c) of the Boulder Canyon Project Act, 43 U.S.C. 617d(c), explicitly specifies a preference for the States of Arizona, California, and Nevada.

[5]Allegheny's claim (Pet. 6) that the court of appeals "fail[ed] * * * to examine or analyze the legislative history presented to it" is patently without merit. As its opinion demonstrates (Pet. App. 24a-26a), the court conducted a thorough examination of the legislative history.

2. Petitioner MTA (86-736 Pet. 11-19) and cross-petitioners (86-942 Cross-Pet. 8-29) assert that the Commission and the court of appeals erred in restricting the phrase "public bodies" to those publicly owned entities that sell and distribute power to ultimate consumers. The court of appeals, however, found that the legislative history convincingly demonstrated that Congress intended the words "public bodies" to refer not to governmental units generally but to public entities that sell and distribute power at retail. As the court pointed out (Pet. App. 20a-21a), the term "public body" was treated in the legislative history as being synonymous with such terms as "municipal utility" or "municipal plant." Moreover, throughout the congressional debates it was implicit that "public bodies" were public entities capable of distributing power (*id.* at 21a). In addition, Congress's purpose in adopting the preference provisions was to promote "[y]ardstick competition." As the court pointed out (*id.* at 19a-20a), such competition would not exist if the public entity used the preference power itself or simply resold it to privately owned utilities. Since the more expansive interpretation of "public bodies" urged by petitioner MTA and the cross-petitioners would contravene Congress's intent, the Commission and the court of appeals properly rejected it.[6]

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[6]MTA errs in asserting (86-736 Pet. 16-17) that the economic pressure of yardstick competition "is of no value today" and that such competition therefore should not have been relied upon by the court of appeals in construing the statute. Such an argument is properly addressed to Congress, not the courts. There is likewise no merit to MTA's argument that the Commission improperly ignored mass transit and environmental considerations. As the court of appeals recognized (Pet. App. 23a-24a n.8), the NRA does not require the Commission "to ignore yardstick competition in favor of subsidizing mass transit" or to classify MTA as a public body in order to promote environmental interests.

CONCLUSION

The petitions and cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

CATHERINE C. COOK
General Counsel

JEROME M. FEIT
Solicitor

JOSHUA Z. ROKACH
Attorney
Federal Energy Regulatory Commission

JANUARY 1987

(3) (5) (3)

Nos. 86-735, 86-736, 86-942

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ALLEGHENY ELECTRIC COOPERATIVE, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

METROPOLITAN TRANSPORTATION AUTHORITY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

RHODE ISLAND PUBLIC UTILITIES COMMISSION,
NEW JERSEY BOARD OF PUBLIC UTILITIES,
Cross-Petitioners,

v.

METROPOLITAN TRANSPORTATION AUTHORITY,
Respondent.

BRIEF IN OPPOSITION TO PETITIONS AND CROSS-PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

KIRK HOWARD BETTS
DICKINSON, WRIGHT, MOON, VAN DUSEN
& FREEMAN
1901 L Street, N.W.
Washington, D.C. 20036
(202) 457-0160
Counsel of Record

Attorney for Respondents
New Jersey Preference Boroughs

January 21, 1987

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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BRIEF IN OPPOSITION TO PETITIONS AND CROSS-PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INTRODUCTION

The New Jersey Preference Boroughs[1], an intervenor-respondent below, submits this Brief in Opposition to Petitions and Cross-Petitions for Writs of Certiorari to the United States Court of Appeals for the Second Circuit by Petitioner Allegheny Electric Cooperative, Petitioner Metropolitan Transportation Authority, and Cross-Petitioners Rhode Island Public Utilities Commission and New Jersey Board of Public Utilities. All three Petitions seek review of various portions of the Second Circuit's decision in *Metropolitan Transportation Authority v. Federal Energy Regulatory Commission,* 796 F.2d 584 (2d Cir. 1986), affirming two opinions issued by the Federal Energy Regulatory Commission, Opinion Nos. 229 and 229-A, 30 FERC(CCH) ¶ 61,323, 32 FERC (CCH) ¶ 61,194. These Opinions interpreted certain provisions of the Niagara Redevelopment Act, 16 U.S.C. §§ 836(b)(1), (2). The common thread running through the Petitions and the Cross-Petition is that the Second Circuit improperly relied upon some or all of the legislative history. The New Jersey Preference Boroughs respectfully suggest to the Court that none of the Petitions or the Cross-Petition present substantive or procedural reasons why this Court should grant the Petitioner's Writs of Certiorari.[2]

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[1] The New Jersey Preference Boroughs consists of the following municipal electric systems in the State of New Jersey: Butler, Lavallette, Madison, Milltown, Park Ridge, Pemberton, South River, Seaside Heights.

[2] For purposes of this Brief, the New Jersey Preference Boroughs adopt the questions presented in each Petition, and the Statement of the Case presented in Allegheny's Petition.

REASONS FOR NOT GRANTING THE WRIT

Allegheny Electric Cooperative, Inc. seeks to have this Court reverse the conclusion of the Second Circuit that the term "neighboring States," 16 U.S.C. § 836(b)(2), should include all states within "reasonable geographic proximity of New York . . . within economic transmission distance." 796 F.2d at 594, at 24a. Allegheny contends that the Second Circuit gave the term a "literal meaning" and consequently failed to fully examine the legislative history which would have resulted in a narrower meaning. Allegheny contends that Pennsylvania and Ohio are the only "neighboring states" entitled to the power made available under section 836(b)(2). The Second Circuit did not "completely ignore" (Petition at 5-6) the legislative history of this term; in fact, the Second Circuit examined the legislative history in detail and reached a conclusion different from Allegheny. 796 F.2d at 594-95, at 24a-26a.

The Metropolitan Transportation Authority seeks to have this Court reverse the conclusion reached by the Federal Energy Regulatory Commission and affirmed by the Second Circuit that "public bodies" under the Niagara Redevelopment Act must be "capable of selling and distributing power directly to consumers of electricity at retail." 796 F.2d at 593, 23a. The MTA does not sell or distribute electricity. Nevertheless, it asserts that a governmental consumer is a "public body" under the Act and therefore, eligible to participate in the allocation of preference power. The MTA contends that the meaning of the term "public bodies" is so clear and unambiguous that it is unnecessary and inappropriate even to look to the legislative history of the Act. This argument, and several

other public policy arguments more appropriately addressed to Congress, were dismissed by the Second Circuit. 796 F.2d at 593-94 n. 8, 23a-24a n. 8.

The Rhode Island Public Utilities Commission and the New Jersey Board of Public Utilities seek to have this Court accept certiorari on the "public bodies" issue presented by the MTA, and to accept a new issue which they call the "state access issue." Reduced to its simplest terms, the Cross-Petitioners are asking the Court to construe the term so as to include a state agency acting as the "bargaining agent" within the class of "public bodies" eligible for preference power even though the state agency has no means of directly selling and distributing power to consumers at retail. Without so stating, the Cross-Petitioners are asking the Court to reverse the Second Circuit's affirmation of the FERC's Opinion that the Vermont Department of Public Service, as constituted prior to 1986, was not a public body "entitled to purchase preference power from PASNY." 796 F.2d at 593 (footnote omitted), 23a.

In support of its position, the Cross-Petitioners complain that the FERC and the Second Circuit should give the term "public bodies" its plain or literal meaning without reference to the legislative history. In support of this proposition the Cross-Petitioners selectively cite portions of this Court's decisions that teach us that statutory construction questions *begin* with the language of the statute itself (Petition at 13-14). Cross-Petitioners conveniently fail to cite to equally relevant cases that state that studying the legislative history is an entirely appropriate and important task in construing a statute. This Court has said:

> When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination." *United States v. American Trucking Assns.*, 310 U.S. 534, 543-544 (1940) (footnotes omitted). See *Cass v. United States*, 417 U.S. 72, 77-79 (1974). See generally Murphy, Old Maxims Never Die: The "Plain Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts, 75 Col.L.Rev. 1299 (1975). *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 10 (1976).

Ironically, after urging that the Second Circuit erred by relying on the legislative history to construe the term, the Cross-Petitioners then proceed to cite partial legislative histories of several federal preference-type acts and selectively delve into the legislative history of the Niagara Redevelopment Act to support its contention that a state agency that is not a seller and distributor of electricity to consumers at retail should be a Niagara Redevelopment Act "public body."

The Cross-Petitioners also argue that certiorari is appropriate because, "By subordinating its own judgment to the Second Circuit's *PASNY* decision, the FERC abdicated its decisional responsibility and ignored this Court's rulings," (Petition at 21), citing *Chevron U.S.A., Inc. v. National Resource Defense Council, Inc.*, 467 U.S. 837 (1984) and *Chemical Manufacturers Ass'n. v. NRDC*, 470 U.S. 116 (1985). Cross-Petitioners' reliance on these cases is misplaced. The FERC did not read *PASNY v. FERC*,

743 F.2d. 93 (2d Cir. 1984) incorrectly, and *PASNY* certainly did not involve the question of deference to an administrative agency.

In summary, the three Petitions ask this Court for another opportunity to argue their case but all three fail to provide compelling reasons for granting writs of certiorari. None of the Petitions can show a conflict between circuits or between state and federal courts over the Niagara Redevelopment Act; none present convincing arguments that the Second Circuit departed from the accepted course of judicial proceedings or failed to follow the rules for statutory construction; none persuasively argue that a federal question has been construed in conflict with applicable decisions of this Court. In summary, the Petitioners and Cross-Petitioners fail to meet any of the threshold criteria outlined in Rule 17.1 of the Supreme Court Rules.

CONCLUSION

For the foregoing reasons, this Court should deny the Petitions and Cross-Petition for Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

KIRK HOWARD BETTS
(Counsel of Record)

DICKINSON, WRIGHT, MOON, VAN DUSEN
& FREEMAN
1901 L Street, N.W.
Washington, D.C. 20036
(202) 457-0160

Attorney for Respondent
New Jersey Preference Boroughs

January 21, 1987

No. 86-735

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ALLEGHENY ELECTRIC COOPERATIVE, INC.,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DAVID R. STRAUS
(Counsel of Record)

SCOTT H. STRAUSS
Spiegel & McDiarmid
1350 New York Avenue, N.W.
Suite 1100
Washington, D.C. 20005-4798
(202) 879-4000

Attorneys for Respondents
Massachusetts Municipal
Wholesale Electric Company
and Connecticut Municipal
Electric Energy Cooperative

December 22, 1986

STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

The Massachusetts Municipal Wholesale Electric Company ("MMWEC") is a public corporation and political subdivision of the Commonwealth of Massachusetts, created pursuant to Mass. Statutes 1975, Chapter 775.

The Connecticut Municipal Electric Energy Cooperative ("CMEEC") is a public corporation and political subdivision of the State of Connecticut, created pursuant to Title 7, Chapter 101a of the General Statutes of Connecticut (1975).

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INTRODUCTION AND SUMMARY

The Massachusetts Municipal Wholesale Electric Company ("MMWEC") and the Connecticut Municipal Electric Energy Cooperative ("CMEEC"), intervenor-respondents below,[1] submit this Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit submitted by Allegheny Electric Cooperative, Inc. ("Allegheny").[2] Allegheny seeks review of that portion

[1] MMWEC and CMEEC were intervenor-respondents before the Second Circuit on the issue raised here by Allegheny Electric Cooperative, Inc. CMEEC was also a petitioner in one of the consolidated dockets below, raising an issue which is unrelated to the issue here and as to which certiorari has not been sought.

[2] CMEEC and MMWEC, which are political subdivisions of the states of Connecticut and Massachusetts, respectively, serve as bulk power suppliers for their municipal electric distribution system members. MMWEC is composed of 34 member systems; CMEEC is composed of three member systems, known as "Participants."

of the decision in *Metropolitan Transportation Authority* v. *Federal Energy Regulatory Commission*, 796 F.2d 584 (1986) (Petition Appendix at 1a-28a), holding that the term "neighboring States" in Section 836(b)(2) of the Niagara Redevelopment Act ("NRA"), 16 U.S.C. § 836(b)(2), means "states found to be within reasonable geographical proximity of New York, after taking into account all relevant factors and whether they are within reasonable economic transmission distance." 796 F.2d at 594, at 24a. Except for those portions which contain legal argument, for purposes of this brief MMWEC and CMEEC accept Allegheny's statement of the question presented and its statement of the case (as well as its description of and appendices containing the opinions below, an explanation of the basis for this Court's jurisdiction and a recital of the statute involved).[3]

Allegheny seeks here, as it has (unsuccessfully) before the Federal Energy Regulatory Commission ("FERC"), the New York Power Authority ("NYPA"), and the courts for ten years, a ruling that the NRA's general phrase, "neighboring States," in fact means exclusively the states of Pennsylvania and Ohio. The effect of the ruling would be to deprive rural electric cooperatives and NRA "public bodies" in Connecticut, Massachusetts, New Jersey, Rhode Island and Vermont of a valuable "preference power" resource,[4] and to provide eligible preference power customers in Ohio and Pennsylvania

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[3] Specifically, MMWEC and CMEEC do not accept Allegheny's inclusion in its Question Presented (Petition at i) of the words "as revealed by the legislative history," nor do they accept the following sentence contained in Allegheny's Statement of the Case (Petition at 4-5):

> This interpretation is contrary to an extensive and explicit legislative history which clearly establishes that Congress intended the phrase 'neighboring states' be limited to Pennsylvania and Ohio, the only states within the basin drained by the Niagara River which are claimed by any party to be within economic transmission distance of the Project.

[4] NRA "preference power" is the 50 percent of the output of the Niagara Project for which "public bodies and nonprofit cooperatives" are given purchasing "preference and priority." 16 U.S.C. § 836(b)(1).

with an even larger share of this inexpensive resource than the proportionate allocation they now receive.[5]

In support of its petition, Allegheny is unable to: (1) show the existence of any conflict between the Second Circuit's decision and the determination of another court; (2) show the presence of an issue of national importance; or (3) identify any constitutional implications of the issue it raises. Instead, Allegheny seeks a writ of certiorari by claiming that the Second Circuit's approach toward statutory construction conflicts with the teachings of this Court, and by presenting a speculative and ill-conceived claim as to the importance of this issue. Neither of these bases justifies intervention here.[6]

REASONS FOR NOT GRANTING THE WRIT

Allegheny advances two reasons which allegedly justify the granting of a writ. First, Allegheny contends that the Second Circuit's actions conflict with this Court's teachings concerning the uses of and the relationship between legislative history and "plain meaning" in statutory construction. Second, Allegheny argues that this case is of great importance because the Second Circuit's ruling could lead to the dilution of NRA preference power. Allegheny asserts that such dilution will make it "quite likely" that the pro-competitive effect of the NRA sought by Congress "may" be greatly reduced. As neither of these assertions represents an accurate portrayal of the decision below, neither justifies the issuance of a writ here.

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[5] While it would appear, given the result of a victory here, that eligible entities in both Pennsylvania and Ohio would pursue this relief in tandem, it is noteworthy that public power entities in Ohio (which participated actively on a number of issues raised below) did not join in or even support Allegheny's claim before the Second Circuit.

[6] Indeed, Allegheny's claim concerning the importance of this issue surfaced for the first time in Allegheny's application for rehearing of the challenged Second Circuit opinion. In other words, having argued its "Pennsylvania and Ohio" position before the Federal Energy Regulatory Commission, the New York Power Authority and the Second Circuit on numerous occasions since 1976, Allegheny discovered its claim concerning dilution (to be addressed below) only this year.

I. THE SECOND CIRCUIT DID NOT FAIL TO ANALYZE THE NRA LEGISLATIVE HISTORY; RATHER, ITS ANALYSIS LED THE COURT TO A CONCLUSION WHICH DIFFERS FROM THAT ADVANCED BY ALLEGHENY

Allegheny alleges (Petition at 5) that in construing the phrase "neighboring States" broadly the Second Circuit "implicitly" relied solely upon the "plain meaning" of the words, and failed to "analyze fully" the legislative history thereof. Expanding on this contention, Allegheny claims (Petition at 5-6 and 11) that the court "completely ignored" certain portions of the legislative history and, in fact (Petition at 6), failed "even to examine" the relevant excerpts of the legislative history materials cited by Allegheny. According to Allegheny, this action, and inaction, by the Second Circuit violates this Court's ruling in a number of cases that it is improper to blindly adhere to a statute's plain meaning where it is at odds with a clearly expressed congressional purpose.

It is not necessary to quarrel with Allegheny's interpretation of the relevant case law to demonstrate the fallacy of its argument, because – contrary to Allegheny's repeated assertion – the Second Circuit did not fail to "examine" and "to analyze fully" the relevant portions of the NRA's extensive legislative history (including those portions cited by Allegheny), nor did it "completely ignore" that history. Rather, the Second Circuit undoubtedly read Allegheny's brief and examined the relevant history Allegheny deemed appropriate, for the court's opinion contains repeated citations to the NRA legislative history in support of the court's interpretation of the phrase "neighboring States." Thus, the Second Circuit's discussion of the "neighboring States" question, 796 F.2d 584 at 594-95, at 24a-26a, rather than ignoring the NRA's legislative history, cites to that history more than twenty times. Given the court's thorough review of this material, it is apparent that Allegheny's true complaint is not that the Second Circuit failed to address the legislative history but that, having done so, it reached an interpretation thereof contrary to that contained in Allegheny's briefs.[7]

[7] Allegheny's further complaint (Petition at 21) that certain portions of the legislative history "say nothing" about sending power to states

Among the decisions of this Court relied upon by Allegheny (Petition at 9-10) is *Stafford* v. *Briggs*, 444 U.S. 521 (1980), where (*id.* at 536) the Court deemed it essential in interpreting a statute's meaning to look beyond the statutory language and to consider the statute's "objects and policy." Unlike Allegheny, which has never presented any policy reason why Congress might have wished to limit the sales of Niagara power to only two neighboring states, the Second Circuit in fact examined the NRA's "objects and policy" as expressed in the legislative history and concluded that the language used in the statute was consistent with that history. Thus, Allegheny's argument that the Second Circuit violated the teachings of this Court is erroneous and provides no basis for granting a writ here.[8]

II. THE DECISION IN THIS CASE WILL NOT THWART THE INTENT OF CONGRESS AS EXPRESSED IN EITHER THE NRA OR IN OTHER PREFERENCE LAWS

In an attempt to associate its "Pennsylvania and Ohio" argument with an issue of national importance, Allegheny offers its recently developed hypothesis that limiting the

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other than Pennsylvania and Ohio is not true, for the legislative history relied upon by the court contains references to other states and demonstrates that, as argued by MMWEC, CMEEC, and others, the boundaries envisioned by Congress on the sale of NRA preference power were practical and economic, not political. Thus, Allegheny's attempt (Petition at 22) to distinguish a reference to Massachusetts made by Congressman Miller by deeming him "confused" falls short, for it is difficult to imagine one would say "Massachusetts" when one means "Pennsylvania and Ohio." Similarly, Allegheny's attempted refutation of Congressman Chavez's reference to New England (Petition at 25) with the argument that New York, Ohio and Pennsylvania make up a large part of the northeastern section of the country should be rejected, for this Court can judicially notice that neither New York, Ohio, nor Pennsylvania is considered to be part of New England.

[8] Allegheny relies most heavily upon *Train* v. *Colorado Public Interest Research Group*, 426 U.S. 1 (1976). However, in that case this Court noted (*id.* at 9) that the appellate court decided the issue before it "exclusively by reference to the language of the statute" without giving any weight whatsoever to the legislative history. As shown above and as is evident in the Second Circuit's decision, that is surely not the case here.

distribution of preference power solely to two states will advance Congress's goal, expressed in the NRA, of fostering yardstick competition. Allegheny alleges (Petition at 25-29) that the Second Circuit's ruling, by permitting NRA preference power to be sold outside of Pennsylvania and Ohio,[9] frustrates that congressional goal because the competitive benefits of preference power are diluted as a result of its broader dispersion.

This Court should note that Allegheny's "dilution" argument is not addressed in the Second Circuit decision, for Allegheny did not brief the dilution argument to either the Second Circuit or to the FERC in the underlying administrative proceeding. Rather, the argument surfaced for the first time in Allegheny's application for rehearing of the Second Circuit decision, and the late appearance of this contention underscores both its invalidity and insignificance. As the claim was not made prior to the close of the record here, there is no underlying record evidence to support Allegheny's dilution claim. Thus, Allegheny is left to argue (Petition at 29) only that it is "quite likely" that savings will be inadequate and that the intended pro-competitive effect "may" be greatly reduced. MMWEC and CMEEC emphatically deny these assertions. In fact, the battle for allocations of NRA preference power is still being waged before the FERC, *see Municipal Electric Utilities Association of New York State, et al.* v. *PASNY*, FERC Docket Nos. EL86-24, *et al.*, "Order Establishing a Hearing, Granting Interventions, Extending the Time for the Filing of Motions to Intervene, Consolidating Proceeding, and Denying Motion to Initiate Enforcement Action," 35 FERC ¶61,333 (June 13, 1986), and before this Court. *Metropolitan Transportation Authority* v. *Federal Energy Regulatory Commission*, 796 F.2d 584 (2d Cir. 1986), *petition for cert. filed*, Docket No. 86-736 (U.S. Nov. 3, 1986). The continuation of this battle is evidence that savings in all of the recipient neighboring states are not insignificant, and that

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[9]NRA preference power is also sold in significant quantities in Vermont, Massachusetts, Connecticut and New Jersey; in addition, a very small amount of preference power is sold in Rhode Island.

it is far more likely that the present multi-state dispersion of inexpensive power increases competition in these other geographic areas and enhances, rather than reduces, the effects intended by Congress.[10]

CONCLUSION

For the reasons set forth above, this Court should deny the petition of Allegheny Electric Cooperative, Inc. for a Writ of Certiorari.

Respectfully submitted,

DAVID R. STRAUS
(Counsel of Record)

SCOTT H. STRAUSS
Spiegel & McDiarmid
1350 New York Avenue, N.W.
Suite 1100
Washington, D.C. 20005-4798
(202) 879-4000

Attorneys for Respondents
Massachusetts Municipal
Wholesale Electric Company
and Connecticut Municipal
Electric Energy Cooperative

December 22, 1986

[10] In any event, the requirement that recipients be within "economic" transmission distance will assure that power is not dispersed to areas where the economic benefits thereof are *de minimis*.